Tejada v One City Block LLC
2019 NY Slip Op 30893(U)
April 2, 2019
Supreme Court, New York County
Docket Number: 152783/2012
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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RAFAEL TEJADA,

Plaintiff,

- v -

ONE CITY BLOCK LLC, BENCHMARK BUILDERS, TELX / NEW YORK 111 8TH, LLC (3RD PARTY DEFT.), CABLEVISION LIGHTPATH INC,

Defendants.

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INDEX NO. 152783/2012

MOTION DATE _____

MOTION SEQ. NO. 003; 004; 005; 006; 007; 008

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 142

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 253, 262, 267, 269, 270

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 202, 252, 254, 259, 260, 261, 263, 268

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 255, 257, 258, 264, 273

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 256, 265, 266, 271, 272

were read on this motion to/for JUDGMENT - SUMMARY.

This is a Labor Law dispute wherein plaintiff Rafael Tejada, an electrician, claims that he slipped and fell on construction dust as he attempted to bend conduit

pipes using a pipe bender. Plaintiff alleges that defendants One City Block LLC (owner of the premises – "One City Block"), Benchmark Builders (a construction manager/general contractor on an earlier project at the property – "Benchmark"), and Cablevision Lightpath Inc. (telecommunications contractor, also referred to in papers as Lightpath Lightpath Inc. – "Lightpath") were negligent and that said negligence caused his accident. Plaintiff also claims violations of Labor Law §200, 240, 241(6), as well as Industrial Code §§ 23-1.5(a) and (c); 23-1.7(b), (d), (e), (e)(1), (e)(2); 23-1.5; and 23-4.2(a) (NYSCEF #153 – Bill of Particulars).

Additional parties have been brought into this matter as third-party defendants. One City Block impleaded Telx-New York 111 8th, LLC. (a data center services company – "Telx") on December 14, 2012 (NYSCEF #4 – First Third-Party Complaint). Telx, in turn, impleaded Lightpath on June 19, 2013 as it was Telx's communications installation contractor (NYSCEF #7 – Second Third-Party Complaint). Plaintiff then amended his complaint to include Lightpath as a direct defendant (NYSCEF #11 – Amended Complaint). Telx and Cablevision filed a third third-party complaint against Network Technology Solutions, Inc. ("Network"), a fiber optic wiring company that in turn retained plaintiff's employer Stanco Electric ("Stanco") as a subcontractor on April 2, 2015 (NYSCEF #25 – Third Third-Party Complaint). Finally, One City Block filed a fourth third-party complaint against Collins Building Services, Inc. (a cleaning services company – "Collins") on February 23, 2016 (NYSCEF #46 – Fourth Third-Party Complaint).

This decision will address motion sequences 003 to 008. First, in motion sequence 003, fourth third-party defendant Collins moves: (1) pursuant to 22 NYCRR § 202.21(e), to vacate the Note of Issue and strike this action from the trial calendar on the basis that all pre-trial discovery proceedings have not been completed and this matter is not ready for trial; (2) pursuant to CPLR § 312, to compel plaintiff to complete outstanding discovery; (3) pursuant to CPLR 3212(a), to extend the deadline for Collins to move for summary judgment, to 120 days following completion of discovery; and (4) pursuant to CPLR 2201, to stay the trial of this matter until pre-trial discovery is complete.

Next, in motion sequence 004, defendant One City Block moves pursuant to CPLR 3212 for summary judgment against fourth third-party defendant Collins for full contractual indemnification and against plaintiff to dismiss the complaint. In motion sequence 005, defendant Benchmark also moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims. In motion sequence 006, fourth third-party defendant Collins moves for summary judgment to dismiss the fourth third-party complaint and all claims asserted against Collins. In motion sequence 007, third third-party defendant Network moves for summary judgment to dismiss plaintiff's complaint, the third third-party complaint, and all claims against Network. In motion sequence 008, Lightpath and Telx move for summary judgment to: (1) dismiss plaintiff's complaint; (2) declare that Network is contractually obligated to defend, indemnify and hold harmless Lightpath and Telx for

plaintiff's claims; and (3) set this matter down for a hearing to determine the amount of damages owed to Lightpath and Telx by Network Technology based on Network Technology's obligation to defend and indemnify Lightpath and Telx. The Decision and Order is as follows:

FACTS

For the sake of clarity, the relationship among the parties are as follows: (1) One City Block is the owner of the 111 8th Avenue building and retained Collins as a cleaning contractor; (2) Telx, a data center manager, retained Lightpath as a contractor for a fiber optic cable installation project; (3) Lightpath, in turn, relied upon Network as a subcontractor to perform all the work related to the fiber optic installation project; (4) for its part, Network retained plaintiff's employer, non-party Stanco, as a sub-contractor to perform the conduit work at issue here; and (5) Benchmark was a general contractor for an earlier construction project at 111 8th Avenue but is otherwise unconnected to any of the parties here. It is unclear from the facts who, if any, the "general contractor" was on the conduit installation project at issue here.

Plaintiff Ruben Tejada testified that on April 11, 2012, he was employed as an electrician by Stanco, a subcontractor hired to install electrical conduit on behalf of Lightpath at 111 Eighth Avenue located in the city, county, and state of New York (NYSCEF #167 – June 25, 2013 EBT of Tejada at 18). On the morning of the accident, Tejada and his apprentice, Steven Pallay, were bending conduit on the eighth floor in a corridor that was about eight feet wide and approximately 700 to 800 feet long (*id.* at 28). Tejada testified that he observed dust and debris on the marble floor in the corridor that morning; however, he never saw any cleaners or porters cleaning the floor in that area prior to the accident (*id.* at 66). Tejada claims that the dust was present before the day of the accident and that he discussed why the hallway was "so dirty" with his apprentice (*id.* at 122-23). Tejada stated that the dust was "grayish-white" in color and that it was coming through a vent (*id.* at 144). According to Tejada, the accident occurred as he was bending a piece of conduit. He stated that just before the accident he had put one foot on the "bender" as normal and then he slipped on the dust and/or debris and fell, injuring himself (*id.* at 119-120).

A photograph of the accident site taken immediately after Tejada's fall does not reveal any dust or debris (NYSCEF #139 – Photographs of Accident Site). Tejada argues that the polished concrete floor is grayish-white and that the dust is not visible because it was also grayish-white (NYSCEF #267 – Pl's Memo in Opp at ¶7). Tejada further argues that while the photograph depicts in general how the area looked at the time of his fall, he actually slipped and fell "somewhere off to the right of the area shown" in defendants' photograph (*id.* at ¶6). However, the photographs clearly show plaintiff and there is no "grayish-white" dust visible on plaintiff's dark blue clothing.

As to the cleaning procedures, Kurt Kurtali, an employee of property manager Taconic Management, testified on behalf of One City Block as the building's assistant property manager. Kurtali testified that one of his responsibilities was to make sure that the common areas in the building were clean (NYSCEF #133 – EBT of Kurt Kurtali at 20). Kurtali testified that there were cleaning personnel that clean the hallways at night and that a cleaning crew would go around to check for debris in the morning. The cleaning service that was used was Collins (*id.* at 21). Besides cleaning the hallways at night, the cleaning crew also policed the common areas at 8:00 AM every morning (*id.* at 25). Collins had people on site throughout the day (*id.* at 24). Kurtali testified that he knew that Collins' crew did its rounds the day of the accident because when he got to the location where plaintiff was on the floor, he looked around and observed that everything was in great condition (*id.* at 41). He did not observe any dust on the corridor floors (*id.* at 45-46). Kurtali also testified that there was no construction work taking place on the 8th floor; only the conduit work that plaintiff was doing (*id.* at 57).

Adding to the discussion regarding cleaning procedures, Carlos Ocampo, a night operations manager for Collins, testified that Collins maintained a 24/7 presence in the building and that the accident occurred on a highly trafficked floor that was policed for dirt and debris more frequently than other parts of the building (NYSCEF #134 – EBT of Carlos Ocampo at 22, 27).

Other witnesses did not see any dust or debris at the accident site. Contrary to plaintiff's testimony, plaintiff's apprentice, Steven Pallay, testified that there was no dust, debris, or sheetrock pieces on the floor of the accident site (NYSCEF #135 – EBT of Steven Pallay at 20-21). Pallay stated that dust did not blow out of the vents and that "this was a main hallway" which was a "clean, safe work area" (*id.*). Pallay also testified that he never discussed the condition of the floor with plaintiff and had not heard of anyone complaining about the condition of the floor (*id.*). Otilio Hernandez, a security guard at 111 8th Avenue, testified that he responded to the accident, took photos, and did not observe any dust or debris on the floor and that the concrete was "dry" (NYSCEF #136 – EBT of Otilio Fernandez at 10-11, 32). Additionally, Jason Monserrate, Stanco's employee and plaintiff's colleague who responded to the accident, testified that "the floor was glossy ... [and] shiny", and that he did not see any dust on the ground (NYSCEF #137 – EBT of Jason Monserrate at 31). Monserrate also testified that when he asked plaintiff what happened, plaintiff responded that "the circuit bender gave way from underneath [plaintiff]" (*id.* at 26-27). In the accident report, Monserrate informed that "[plaintiff] was using a pipe bender on the floor with no mat, when he slipped off the bender and hurt his ankle" (NYSCEF #288 at 2).

SUMMARY JUDGMENT STANDARD

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the

motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [lst Dept 2002]).

CLAIMS AGAINST BENCHMARK BUILDERS

Defendant Benchmark's motion for summary judgment (MS5) is granted. Benchmark was hired to renovate the cafeteria that was located on the 8th floor of 111 8th Avenue. It is undisputed that Benchmark's work began August 30, 2011, and was completed by November 10, 2011 (NYSCEF 156 – EBT of Fred Sacramone at 10-11). There are no records showing that Benchmark performed any work on the 8th Floor of 111 8th Avenue on April 11, 2012, or at any time near the incident in question. Nothing in the record indicates that Benchmark was the general contractor for the conduit project in question here. As such, Benchmark has made a prima facie showing that it did not create the alleged defective condition that has gone unrebutted by plaintiff. Accordingly, defendant Benchmarks' motion for summary judgment is granted.

PLAINTIFF'S LABOR LAW §241(6) CLAIM

As a preliminary matter, plaintiff only defends his common law negligence claim, his Labor Law §200 claim, and his Labor Law §241(6) / Industrial Code 23-1.7(d) claim. As such, plaintiff's Labor Law §240 and Industrial Code §§ 23-1.5(a) and (c); 23-1.7(b), (e), (e)(1), (e)(2); 23-1.5; and 23-4.2(a) claims are dismissed.

Turning to plaintiff's Labor Law §241(6) claim first, the branches of defendants' and third-party defendants' motions on this claim are all granted. Labor Law §241(6) provides that "[a]ll areas in which construction... work is being performed shall be so constructed... equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein". This duty of owners, contractors, and agents is "nondelegable" (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 348 [1998]). There is, thus, no need to "show that defendants exercised supervision or control over [plaintiff's] worksite in order to establish [plaintiff's] right of recovery" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 502 [1993]). To prove a Labor Law §241(6) claim, plaintiff must make "reference to outside sources to determine the standard by which a defendant's conduct must be measured" (*id.* at 504). Thus, to establish liability, a plaintiff "must specifically plead and prove the violation of an applicable Industrial Code regulation" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

Plaintiff alleges a violation of Industrial Code 23-1.7(d) which covers slipping hazards as follows: "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Plaintiff argues that the presence of dust on the floor/passageway in which he was performing his duties caused his slip and fall.

Defendants argue that plaintiff's claims are at best speculative and that photographic evidence disproves his allegations. Defendants also point to the testimony of Pallay, Hernandez, and Monserrate who all testified unequivocally that there was no dust at the accident site. Additionally, Monserrate testified that plaintiff slipped off the conduit bender and injured his ankle. Defendants have made a prima facie showing of entitlement to summary judgment – the lack of dust means there can be no IC 23-1.7(d) violation. The court adds that the photographic evidence is particularly compelling – there is no visible dust on the ground and Tejada's dark blue jeans do not show any signs of dust.

Plaintiff's rebuttal is that Tejada unequivocally testified that "sheetrock dust" covered the floor and caused his slip and fall and therefore there is a question of fact. However, plaintiff does not proffer any additional evidence beyond his words. And his words have been thoroughly contradicted: (1) Pallay testified that he did not have any conversations with Tejada about the alleged dust and that he did not see any dust come out of the vents; (2) Hernandez and Monserrate also testified that there was no dust; (3) the photographs show absolutely no dust; and (4) Monserrate testified that the conduit bender giving way and plaintiff slipping off of it caused the injury.

While usually "[t]he assessment of the value of a witness's testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony", the court is not "required to shut its eyes to the patent falsity of a [claim]" (*Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 [1996]; see also *Cathern v Sherman*, 169 AD3d 416, 417 [1st Dept 2019] [quoting *MRI Broadway Rental v United States Min. Prods. Co.*, 242 AD2d 440, 443 [1st Dept 1997]]). Plaintiff's testimony is contradicted by every single piece of evidence in the record and the photograph of the accident scene makes plaintiff's testimony particularly incredible as a matter of law (*see Cathern*, 160 AD3d at 417-418; *see also Annuziata v Colasanti*, 126 AD2d 75, 79 [1st Dept 1987] [photographic evidence "stripped [plaintiff's] testimony of any legitimacy it might otherwise have had"]; *Walker v Murray*, 255 AD 815 [2d Dept 1938] [finding that plaintiff's testimony as to the condition of a stairway was incredible as a matter of law due to photographic evidence disproving plaintiff's claims]). Accordingly, plaintiff has failed to show a triable issue of fact and his claim must be dismissed.

PLAINTIFF'S LABOR LAW §200 AND COMMON LAW NEGLIGENCE CLAIMS

Next up are plaintiff's Labor Law §200 and common law negligence claims. "Section 200 of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*id.* at 143-144). "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" (*id.*; *see also Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). On the other hand, "[w]here the injury was caused by the manner and means 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" (*Cappabianca*, 99 AD3d at 144).

Again, as above, plaintiff cannot maintain a viable Labor Law §200 or common law negligence claim. Defendants have made a prima facie showing that there was no dust and there was therefore no dangerous condition. As plaintiff has failed to adduce any evidence creating an issue of fact, defendants have met their burden for summary judgment. Accordingly, plaintiff's Labor Law §200 and common law negligence claims are dismissed.

Having resolved the summary judgment motions outstanding against plaintiff, the indemnification disputes in the various third-party actions are diminished but are nonetheless addressed below for complete resolution of this case.

ONE CITY BLOCK AND COLLINS' INDEMNIFICATION AND CONTRACT DISPUTE

One City Block and Collins have submitted dueling summary judgment motions (MS4 and MS6) to resolve an indemnification and breach of contract dispute. Collins was the cleaning contractor for the One City Block owned building. As part of their contractual agreement, the parties agreed to the following terms:

> CONTRACTOR shall, to the fullest extent permitted by law and at its sole cost and expense, defend, indemnify and hold harmless AGENT and OWNER, its directors, officers, employees, members, partners, principals, lenders, agents and representatives from and against any and all claims, loss (including attorney's fees, witness fees and all court costs), damages, expense and liability resulting from injury and or death of any person, or damage to or loss of any property and is arising out of any act, error, omission or breach in connection with CONTRACTOR's operations and services hereunder or any breach by contractor of its obligations under this

> agreement. For the purposes hereof, the term CONTRACTOR shall include CONTRACTOR and its employees, subordinates, agents, subcontractors and associates. (NYSCEF #188 – Collins' Contract at Art. 11(a))

"[W]here the parties to a breach of contract action dispute the intended meaning of the agreement, we look to the contract itself to determine if the terms are unambiguous, giving the words of the contract their 'plain meaning'" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 250 [2014]). It is clear from the language of the agreement that Collins is not obligated to indemnify OCB merely because a claim was filed by plaintiff; liability must be found in the underlying action for Collins to be found liable to OCB. Accordingly, OCB's motion for summary judgment is denied.

Indeed, as plaintiff's underlying suit has been dismissed, One City Block has no recourse against Collins in this matter. Accordingly, Collins' motion for summary judgment to dismiss OCB's claim for indemnification is granted.

Turning to One City Block's breach of contract claim against Collins, Collins' motion is granted, One City Block's is denied, and the claim is dismissed. One City Block argues that Collins breached Article 10(c) of their services contract by failing to provide One City Block with additional insurance coverage that specifically included the agent (Collins) and owner (One City Block) as insureds. Collins argues that it obtained a blanket coverage policy that insured any "owner, lessee, or contractor whom you have agreed to include as an additional insured under a written contract provided that such was executed prior to an occurrence" (NYSCEF #189 – Collins' Insurance Policy at Endorsement 27). The First Department has held that a blanket policy defeats a claim for breach of the obligation to obtain an "additional insured" policy (*see Perez v Morse Diesel Intl. Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). As such, Collins is not in breach and One City Block's claim is dismissed.

TELX, LIGHTPATH, AND NETWORK TECHNOLOGY'S INDEMNIFICATION DISPUTE

For their part, Telx and Lightpath move for a declaration that Network is obligated to defend and indemnify them in this action. Network also moved for a declaration that it is not required to indemnify Telx and Lightpath, but it focused its moving papers solely on defeating plaintiff's underlying claims and not the indemnification claims asserted by Telx and Lightpath. Consistent with the finding in favor of defendants against plaintiff, Network's motion is granted and Telx's and Lightpath's motion is denied.

The indemnification clause at issue here is as follows:

> Contractor shall indemnify, defend and hold Lightpath harmless from and against any and all claims, losses, fines and damages arising, in any way whatsoever, out of Contractor's performance of of its obligations

hereunder, provided such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, or injury to or destruction of tangible property. (NYSCEF #228 – Agreement between Lightpath and Network Technology at 3).

As there is no underlying claim, Network cannot be required to indemnify Telx and Lightpath.

COLLINS' MOTION TO VACATE NOTE OF ISSUE

Finally, Collins' unopposed motion to vacate the note of issue is denied as moot. No further discovery is needed in this now dismissed matter.

Accordingly, it is hereby ORDERED that defendants' and third-party defendants' respective motions for summary judgment are all granted to dismiss plaintiff's claims, and as no claims remain, the complaint is dismissed; it is further

ORDERED that Collins' motion for summary judgment to dismiss third-party plaintiff One City Block's claim for breach of contract and indemnification is granted; it is further

ORDERED that One City Block's motion for summary judgment against Collins is denied; it is further

ORDERED that Network Technology's motion for summary judgment to dismiss Telx's and Lightpath's indemnification claims is granted; it is further

ORDERED that Telx's and Lightpath's motion for summary judgment against Network Technology is denied; it is further

ORDERED that Collins' motion to vacate the note of issue is denied as moot; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the decision and order of the court.

4/2/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE