

Di Simone v Southside Manhattan View LLC
2019 NY Slip Op 31261(U)
May 6, 2019
Supreme Court, Kings County
Docket Number: 502825/2013
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

GIOVANNI DI SIMONE,

Plaintiff,

-against-

**SOUTHSIDE MANHATTAN VIEW LLC, FOCUS
CONSTRUCTION GROUP BY B.A. INC., and
SALVATORE CAMPISI & SONS ELECTRICAL
CONTRACTING, INC.,**

Defendants.

X

DECISION / ORDER

**Index No. 502825/2013
Motion Seq. No. 6
Date Submitted: 2/28/19
Cal No. 14**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Southside Manhattan View LLC's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>108-121</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>147-151, 168-170</u>
Reply Affirmations.....	<u>166, 178</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Background

This is a personal injury action that arises out of a construction accident which occurred on August 2, 2012 at 68-10 58th Avenue in Maspeth, New York, which was undergoing renovation, which included the addition of two new floors, according to the New York City Department of Building's website. The property was turned into an 8-unit apartment building with an office and four parking spaces. Plaintiff has asserted causes of action for violations of Labor Law §§ 200, 240(1), and 241(6) and common

law negligence. Plaintiff Giovanni DiSimone was employed by a plumbing contractor (CN Plumbing, Inc.) in connection with the renovation of the subject building. When the defendant property owner, Southside Manhattan View LLC ("Southside"), purchased the building about a year before the accident, the renovation work was 80-90% complete. The prior owner had apparently filed for bankruptcy.

Southside's managing member, Mr. Salvatore Mendolia, testified that he had hired defendant Focus Construction Group by B.A. Inc. ("Focus") as the general contractor to finish the work on the building, other than the plumbing and electrical work, pursuant to an oral agreement which was supplemented by a written indemnification and insurance procurement agreement. Southside's witness testified that Focus also agreed to supervise the electricians and plumbers hired directly by Southside. However, Mr. Mendolia also said he did not know whether Focus actually supervised their work. Focus' witness, Brian Anderson, testified that pursuant to the oral agreement, Focus was hired to obtain amended permits, handle the paperwork with the City of New York and to perform framing and drywall work. He testified that while on paper Focus was the general contractor, it did not hire or supervise the plumbing or electrical contractors, did not schedule their work and did not have the power to stop their work or to remove them from the job. Plaintiff as well as Mr. Salvatore Noto, a witness employed by plaintiff's employer, CN Plumbing, Inc., the plumbing contractor, and Mr. Salvatore Campisi, a witness employed by Campisi & Sons Electrical Contracting, Inc. ("Campisi"), the electrical contractor, all testified that they were not supervised by Focus.

Further, Campisi's witness (Mr. Campisi) testified that his company was hired by Southside's principal, Mr. Mendolia [Exhibit J, Page 13]. Mr. Noto, who testified on

behalf of plaintiff's employer, CN Plumbing, Inc., a non-party, said he did not know anything about the hiring of his company for this job. However, plaintiff supplies a copy of the contract as Exhibit B to his opposition, and it is between CN Plumbing, Inc. and Southside, but this copy is not signed by anyone. It makes no mention of Focus or of any general contractor.

At the time of the accident, while on an A-frame ladder provided by his employer, plaintiff was removing a sprinkler cap in order to change the sprinkler head when his arm came into contact with exposed electrical wires which were hanging from the ceiling. He received an electrical shock that caused him to fall from the ladder. Mr. Campisi testified that after the accident, he examined the area and found the exposed electrical wires which plaintiff had apparently come into contact with. He said the wires should have been capped off until they began to install the ceiling fixtures, but they were not capped off, which he corrected.

The Motion

Defendant owner Southside moves (Mot. Seq. # 6) for summary judgment dismissing the plaintiff's claims for common law negligence and a violation of Labor Law § 200 and for summary judgment on its cross claim for contractual indemnification against defendant Focus. Southside maintains that it did not control or supervise the plaintiff's injury-producing work, so it cannot have any liability to plaintiff under either common law negligence or Labor Law § 200. Movant also avers that the accident plainly arose from the work of the general contractor, Focus, or the work of Focus' subcontractors, so that plaintiff's accident is covered by the clause in the written agreement between Southside and Focus, which requires Focus to indemnify Southside. The court notes that defendant Campisi was previously granted summary

judgment dismissing the plaintiff's Labor Law § 240(1) and 241(6) claims against it, but summary judgment on the plaintiff's Labor Law § 200 and common law negligence claims was denied.

Plaintiff opposes the branch of Southside's motion for summary judgment against him, contending that there are issues of fact as to whether Southside had actual or constructive notice of the exposed electrical wires, a hazardous premises condition. Focus opposes the branch of Southside's motion for contractual indemnification, contending that there has been no finding of negligence on Focus' part to trigger the indemnification provision. Further, Focus maintains that its role was limited under its oral agreement with Southside and that Southside, not Focus, hired the electrical and plumbing contractors and that Focus did not direct or supervise their work. Further, Focus contends that there are issues of fact as to Southside's own negligence—whether Southside was aware that plumbers were working in an area where the electricity was live and the wires were not capped off.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, the court finds that Southside has made a prima facie showing of its entitlement to summary judgment dismissing the Labor Law § 200 and common law negligence claims against it by showing that it did not supervise or control plaintiff's

work. Absent supervision or control by the owner over plaintiff's work, where the accident arose out of the means and methods of the work, the owner cannot be held liable under Labor Law § 200, which codifies the common law duty to provide a safe place to work (see *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505-506 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). To be clear, this claim does not involve a premises condition for which the property owner can be held liable if it is established that the owner had actual or constructive notice of the hazardous condition, as the plaintiff contends. This was a hazardous condition which arose from improper or incomplete electrical work (see *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008] ["when the manner of work is at issue, no liability will attach to the owner solely because he or she may have had notice of the allegedly unsafe manner in which work was performed" (internal quotation marks omitted)]; see also *Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012] ["owners made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that plaintiff's accident was caused by the means and methods employed by the general contractor, namely, the improper installation of a temporary floor, and that they had no supervisory control over the operation"])).

In conclusion, as the mechanism of plaintiff's injury was not a premises condition, and as movant property owner was not supervising the plaintiff's work, these claims must be dismissed.

Turning to the other branch of defendant's motion, the court has finds that summary judgment on Southside's motion for contractual indemnification is not warranted against Focus. The indemnification provision requires Focus to indemnify

SOUTHSIDE for claims arising out of the negligence of Focus or its subcontractors.¹ The nature of Focus' role as a general contractor pursuant to its oral agreement with SOUTHSIDE vis á vis the plumbing and electrical contractors, who may have been hired directly by SOUTHSIDE, and whether they are to be considered subcontractors under Focus' supervision and control, is disputed. Consequently, Southside has not made a prima facie case for an order granting it contractual indemnification. Movant Southside cannot prevail on this motion solely on its own witness' testimony. The only party that claims that the plumbing and electrical contractors hired by Southside were to be supervised by Focus is Southside. There is no evidence that Focus was negligent in performing its work or in supervising their "subcontractors," or whether the plumbing and electrical contractors were even Focus' "subcontractors," so that their negligence would trigger the indemnification provision (*see Martinez v City of New York*, 73 AD3d 993, 999 [2d Dept 2010] ["the indemnification provision . . . required GSF to indemnify the City for claims arising out of the negligence of GSF or its subcontractors. Since it has not been determined whether GSF was negligent, an award of summary judgment on the contractual indemnification cross claim would be premature"]; *Zeigler-Bonds v Structure Tone, Inc.*, 245 AD2d 80, 81 [1st Dept 1997] ["issues exist, first, as to whether its negligence, if any . . . contributed to the accident . . . and, second, as to whether the negligence, if any, of the subcontractor or a party for whom it was responsible contributed to the accident, in the absence of which the indemnity clause would not apply"]; *see generally Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, [2d Dept

¹The agreement provides in pertinent part that Focus, the "Contractor," would indemnify the "Owner" "from and against claims . . . arising out of or resulting from performance of the Contractor's Work, provided that such claim . . . [was] cause [sic] in whole or in part by negligent acts or omissions of the Contractor, [or] the Contractor's Sub-subcontractors [sic]."

2010] ["A party's right to contractual indemnification depends upon the specific language of the relevant contract"].

Accordingly, it is

ORDERED that the motion is granted to the extent that the plaintiff's Labor Law § 200 and common law negligence claims against defendant Southside Manhattan View LLC are dismissed. The branch of the motion which seeks an order of contractual indemnification against Focus is denied.

This constitutes the decision and order of the court.

Dated: May 6, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**