

Navarro v Harco Consultants Corp.
2019 NY Slip Op 31310(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 153306/14
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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MISAEEL NAVARRO,

Plaintiff,

-against-

Index No. 153306/14
Motion Seq. No. 002 and 003

DECISION AND ORDER

HARCO CONSULTANTS CORP. and 301-303
WEST 125th LLC,

Defendants.

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HARCO CONSULTANTS CORP. and 301-303
WEST 125th LLC,

Third-party Plaintiffs,

-against-

GOLD METAL, INC.

Third-party Defendant.

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

In a Labor Law action, defendants/third-party plaintiffs Harco Consultants Corp. (Harco) and 301-303 West 125th LLC (301-303 West) (collectively, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing all claims against them, as well as conditional contractual indemnification from third-party defendant Gold Metal, Inc. (Gold Metal) (motion seq. No. 002). Plaintiff Misael Navarro (Navarro, or Plaintiff) moves for partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against Defendants (motion seq. No. 003). The motions are consolidated for disposition.

BACKGROUND

This case arises from the construction of a four-floor building on West 125th Street in Manhattan. 301-303 West is the owner of property, while Harco was the general contractor on the project. Gold Metal, Plaintiff's employer, performed framing and sheetrock work on the project.

On the day of his accident, March 27, 2013, Plaintiff was framing columns on the third floor of the building. To do his work, Plaintiff was working on a higher platform of a two-tiered scaffold (Plaintiff's tr at 60-61, NYSCEF doc No. 78). Plaintiff testified that the platform he worked on was 10 feet from the ground (*id.* at 61). Plaintiff testified that the scaffold was swaying as he screwed studs in and that he fell off:

Q: You say you lost balance. What do [you] mean by that?

A: I was screwing, but the scaffold was moving, then it collapsed and I fell down.

...

Q: In what way was it moving? Was it swaying, was it shaking, was it gliding? How would you describe the way that the scaffold was moving?

A: It was swaying.

Q: Was anyone with you on your level of the platform at the time the accident happened?

A: No.

Q: Where was [Plaintiff's co-workers] Carlos and Eric at that moment?

A: Eric was working at the bottom.

Q: What was he doing?

A: He was screwing on the bottom, and I was doing it atop.

Q: What about Carlos?

A: Carlos was also putting screws in another area.

(*id.* at 61-62).

Plaintiff used a twelve-foot a-frame ladder to reach the part of the scaffold from which he was working (*id.* at 65). While Plaintiff, along with his co-workers assembled the subject scaffold, Plaintiff testified that Gold Metal did not provide him with materials sufficient to fully construct the scaffold (*id.* at 66). Plaintiff testified that he was concerned about the safety of the

scaffold, as it lacked safety pins, safety railings, and harnesses (*id.*), and that he expressed his concern to Gold Metal's principal, David Gonzalez (Gonzalez) on multiple occasions (*id.* at 68-69). Gonzalez denies that Plaintiff ever made such complaints (Gonzalez tr at 93, NYSCEF doc No. 80).

Plaintiff filed his complaint on April 7, 2014, alleging that Defendants are liable for injuries resulting from his accident under Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff previously moved for summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims, but the court, by a memorandum decision dated May 13, 2016, denied the motion, without prejudice, as premature. Subsequent to that decision, discovery has been completed and Plaintiff filed his Note of Issue on July 2, 2018.

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. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

"All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Here, Defendants argue that the scaffold provided Plaintiff with adequate protection against gravity-related risks. In support, Defendants rely on the affidavit of their expert, Robert O'Connor (O'Connor), who, after reviewing the record, opined that:

"the scaffold was safe to use and code compliant as it was not missing any components or safety devices that either were required to be provided by OSHA or ANSI construction industry standards or that was a substantial factor in the happening of Mr. Navarro's injury incident"

(O'Connor affidavit, ¶ 29, NYSCEF doc No. 82).

As to proximate causation, O'Connor opined that:

"There is a significant discrepancy concerning the details of how Mr. Navarro's injury incident actually occurred. According to the Accident Investigation report prepared by Harco, the Gold Metal workers were 'moving the baker scaffold' while Mr. Navarro was on the scaffold when it jolted and caused Mr. Navarro to fall off the scaffold. According to Mr. Navarro's testimony, however, he was on the scaffold installing screws at the top framing for a column enclosure, to complete the framing work, when the scaffold moved causing him to lose his balance and fall off the scaffold, with the scaffold falling as well. The Accident Report, however, indicates Mr. Navarro may have been misusing and abusing a perfectly safe scaffold"

(*id.*, ¶ 27).

While O'Connor relies on the Harco's accident report to argue that there is an issue of fact as to how Plaintiff's accident occurred, Defendants do not submit that report in support of its motion. However, Gold Metal, which opposes Plaintiff's motion, as well Defendants' application for contractual indemnification, does submit the accident report. It states:

"Gold Metal workers were framing @ 3rd floor and as they were moving their baker scaffold with the injured person on it, [it] jolted & caused the worker to fall off the scaffold and injure his shoulder. Enda from Harco Construction drove him to the hospital to get looked at"

(NYSCEF doc No. 115).

Gold Metal argues that the accident report, which is not supplemented by any deposition testimony or affidavits suggesting that the scaffold was being moved by coworkers at the time of Plaintiff's accident, raises an issue of fact as to whether Plaintiff was a recalcitrant worker.

In opposition, and in support of its own motion, Plaintiff submits an affidavit from its expert, Thomas Cocchiola (Cocchiola), who opines:

"Gold Metal should have furnished the ... scaffold with the required platform guardrail to prevent workers from falling off the scaffold platform. The stacked Werner platform should have been set up with a guardrail before allowing the framing crew to stand or work from the scaffold platform. Mr. Navarro lost his balance and fell off the open, unprotected side of the Werner scaffold platform. The guardrail required by the applicable safety code and Werner was intended to help workers from falling off the scaffold platform. The scaffold collapses as well. Outriggers would have helped stabilize the scaffold and prevented it from collapsing"

(Cocchiola aff, ¶ 15).

Plaintiff argues that the disagreement between the experts, whether the scaffold conformed to OSHA and ANSI standards, and the precise manner of his accident are all irrelevant to the question of liability under the statute, as a mobile scaffold without guardrails is

per se inadequate to protect a worker from gravity-related risks. In support, Plaintiff relies, among others, on *Vergara v SS W. 21, LLC* (21 AD3d 279 [1st Dept 2005]), in which the First Department held that precise manner of the plaintiff's accident was irrelevant where a worker fell from a mobile scaffold that lacked guardrails:

“There is no dispute that the six-foot-high, manually propelled scaffold, which plaintiff was directed to use in order to plaster a fifteen-foot-high ceiling, had no side rails, and no other protective device was provided to protect him from falling off the sides. There is no issue of fact as to whether the defect or insufficiency in the provided protective devices constituted a proximate cause of plaintiff's accident. A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff mis-stepping off its side. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident”

(21 AD3d at 280 [internal citation omitted]).

Defendants, in reply, submit an affidavit from O'Connor, who never personally inspected the subject scaffold. O'Connor focuses on Gonzalez's testimony that the subject scaffold was six feet high, rather than the ten feet testified to by Plaintiff, and argues that manufacturers do not require the use of guardrails for scaffolds under 6 feet: “The manufacturer's instructions ... clearly state that ‘outriggers and guardrails are [only] required where the desired platform height is between 6' and 11'-6 [such that an] additional unit is required, with the instructions clearly showing a second stacked unit that has a second work platform on the upper unit at a height greater than 6 feet” (NYSCEF doc No. 126, ¶ 13 [internal quotation marks omitted]).

Plaintiff, in reply, reiterates his argument that standards under the statute are not coterminous with other industry standards, whether they are manufacturers guidelines or OSHA standards. In support, Plaintiff cites, among others, to *Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]). In *Celaj*, the First Department held that the plaintiff had made a *prima facie* showing by

demonstrating that he fell off of “scaffold without guardrails that would have prevented his fall” (*id.* at 590 [internal quotation marks and citation omitted]). Further, the Court held that the defendants failed to raise an issue of fact warranting trial, as the plaintiff’s “alleged failure to use the locking wheel devices and his movement of the scaffold while standing on it where at most comparative negligence, which is not a defense to a Labor Law § 240 (1) claim” (*id.* [internal quotation marks and citation omitted]).¹ As to the issue of industry standards, the Court held that the “[d]efendants’ expert’s opinion that the lack of safety railings accorded with industry customs and regulations is irrelevant under Labor Law § 240 (1).”

As to the height of the scaffold, this issue is a red herring. In *Haulotte v Prudential Ins. Co. of Am.* (266 AD2d 38 [1st Dept 2004]), a worker “fell off a four-foot high mobile scaffold that did not have guard rails and the wheels of which were not in a locked position, when a co-worker, with whom plaintiff had been drinking about an hour and a half earlier, attempted to reposition the scaffold to install ceiling tiles without realizing that plaintiff was on top” (*id.* at 38). In these circumstances, the First Department held that a statutory violation was present and that it was a proximate cause of the plaintiff’s accident (*id.* at 38-39). In short, none of various cases finding that the absence of a guard rail violated the statute focus on the precise height of the scaffold.

As to proximate causation, *Haulotte* reiterates the principal that owners and general contractors are liable when a statutory violation is a proximate cause of the worker’s accident. Thus, the court held that it cannot “be said that plaintiff’s alleged intoxication was the sole proximate cause of his accident” (266 AD2d at 39). As to recalcitrance, a worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are “readily available at the

¹ The Court rejected an affidavit from a construction manager stating that the scaffold had guardrails, as the affidavit “raises only a feigned issue of fact since it contradicts his earlier deposition testimony” (144 AD3d at 590).

work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Here, the absence of a guardrail was a violation of the statute and a proximate cause of Plaintiff's accident. As to the version of the accident in the accident report, that report has not been properly authenticated as a business record and is thus inadmissible hearsay. A court may consider inadmissible evidence offered by a party opposing a summary judgment motion "insofar as it is not the sole basis" for the opposition to the motion (*Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]). Here, the accident report is the only piece of evidence that contradicts Plaintiff's version of the accident.

Accordingly, Plaintiff's motion cannot be denied on the basis of the accident report. However, even if the report were properly authenticated, admissible, and supported by corroborating evidence, Plaintiff would still be entitled to summary judgment. That is, in either version of Plaintiff's fall, a statutory violation was present and it was a proximate cause of Plaintiff's accident. Gold Metal's argument that Plaintiff was a recalcitrant worker is unpersuasive, as there is no evidence that additional safety devices were available, and Plaintiff failed to use them.

As Defendants violated section 240 (1) by failing to provide Plaintiff with adequate protection against a gravity-related risk, and that violation was a proximate cause of Plaintiff's injuries, the branch of Defendant's motion seeking dismissal of that claim must be denied. Moreover, Plaintiff's motion for summary judgment as to liability under section 240 (1) must be granted.

II. Labor Law § 240 (1)

Labor Law § 241 (6) provides, in relevant part:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

It is well settled that this statute requires owners and contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists “even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), “comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

Plaintiff alleges that defendants violated 12 NYCRR 23-5.18 (b). 12 NYCRR 23-5.18 is entitled “Manually-propelled mobile scaffolds” and its second subsection is entitled “Safety railings required” and provides that “[t]he platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part.” As is apparent from the discussion above in the section 240 (1) context, it is plain that Defendants violated this regulation and that the violation was a proximate cause of Plaintiff’s accident.

Accordingly, the branch of Defendants' motion that seeks dismissal of Plaintiff's section 241 (6) claim must be denied, while the branch of Plaintiff's motion seeking summary judgment as to liability on this claim must be granted.

III. 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.*).

Here, Plaintiff's accident clearly arose from the manner and materials of his work. Defendants make a *prima facie* showing that they did not have supervisory control over Plaintiff's work, through Plaintiff's own testimony (NYSCEF doc No. 78 at 42-47). As Plaintiff does not rebut this showing, the branch of Defendants' motion seeking dismissal of Plaintiff's Labor Law § 200 claim is granted.

IV. Contractual Indemnification

The agreement between Harco and Gold Metal contains an indemnification clause, which provides, in relevant part:

“To the fullest extent permitted by law, [Gold Metal] shall indemnify and hold [301-303 West and Harco] harmless from any and all liability, costs, attorney’s fees, and expenses of whatever nature arising while on or near the project, or while performing contract related work ... or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act by [Gold Metal] ... and whether or not it is alleged that [301-303 West or Harco] contributed to the alleged wrongdoing or is liable due to a non-delegable duty”

(NYSCEF doc No. 84).

While this provision makes reference to negligence, it is also structured so as to provide broad “arising from” liability. That language is plainly triggered, as this action arises from Gold Metal’s work on the project. More specifically, Plaintiff’s claims arise from Gold Metal’s provision to Plaintiff of a mobile scaffold that lacked guardrails.

Gold Metal argues initially that the motion for contractual indemnification is premature, as there remains a question of fact as to Defendants’ negligence. As the court has dismissed all of Plaintiff’s Labor Law § 200 claims as against Defendants, this argument is not an impediment to a grant of summary judgment.

However, Gold Metal argues that such a ruling would violate that antisubrogation rule, under which “an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered” (*New York City Dept. of Transp. v. Petric & Assoc., Inc.*, 132 AD3d 614, 614 [internal quotation marks and citation omitted]).

Here, Gold Metal has accepted tender of defense and indemnification of Defendants. Thus, Gold Metal is correct that the anti-subrogation rule is applicable. However, the antisubrogation rule only bars Defendants only up the exhaustion of the limit of insurance policy

procured by Gold Metal (*see Petric*, 132 AD3d at 615). Thus, Defendants are entitled to a grant of summary judgment for indemnification for any judgment beyond the limit of the insurance policy common to themselves and Gold Metal.

CONCLUSION

Based on the foregoing, it is

ORDERED the branch of defendants/third-party plaintiffs Harco Consultants Corp. (Harco) and 301-303 West 125th LLC (301-303 West) motion (motion seq. No. 002) seeking summary judgment dismissing the complaint is granted only to the extent that Plaintiff's Labor Law § 200 claim is dismissed; and it is further

ORDERED that the branch of 301-303 West and Harco's motion seeking conditional summary judgment as to its claim for contractual indemnification against third-party defendant Gold Metal, Inc. (Gold Metal) is granted only to the extent that 301-303 West are entitled to indemnification from Gold Metal only to the extent and amount that any judgment in this action exceeds the limit of the common insurance policy; and it is further

ORDERED that Plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) and 241 (6) claims (motion seq. No. 003) are granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly.

Dated: May 3, 2019

ENTER:



Hon. CAROL R. EDMEAD, JSC
HON. CAROL R. EDMEAD
J.S.C.