

Serron v RCPI Landmark Props., LLC
2019 NY Slip Op 32053(U)
July 16, 2019
Supreme Court, New York County
Docket Number: 155231/15
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
JORGE D. SERRON,

Plaintiff,

-against-

RCPI LANDMARK PROPERTIES, LLC,

Defendant.

-----X
RCPI LANDMARK PROPERTIES, LLC, i/s/h/a
RCPI LANDMARK PROPERTIES, INC.,

Third-party Plaintiffs,

-against-

NBCUNIVERSAL MEDIA, LLC and NBC
UNIVERSAL, INC.,

Third-party Defendants.

-----X
NBCUNIVERSAL MEDIA, LLC,

Second Third-party Plaintiff,

-against-

T.F. NUGENT, INC.,

Second Third-party Defendant.

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

In this Labor Law action, defendant RCPI Landmark Properties, LLC (RCPI) moves, pursuant to CPLR 3212, for summary judgment on its claim for contractual indemnification against third-party defendant NBCUniversal Media, LLC and NBC Universal, Inc. (collectively, NBC), and dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims as against it. NBC opposes the branch of the motion directed against it, and cross-moves for an order

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DECISION AND ORDER

dismissing the third-party complaint. Plaintiff opposes the branch of RCPI's motion directed against it, and cross-moves for summary judgment as to RCPI's liability under Labor Law § 240 (1) and 241 (6).

BACKGROUND

Plaintiff Jorge Serron (Plaintiff or Serron) alleges that, on July 9, 2014, he was injured while performing work in a mechanical room at the Today Show's studio at 10 Rockefeller Plaza. RCPI owns the building, while NBC rents the studio. On the day of his accident, Plaintiff was working for second third-party defendant T.F. Nugent, Inc. (Nugent) (NYSCEF doc No. 93 at 8). Responding to a work order, Plaintiff went to the closet to repair water damage.

The mechanical room that Plaintiff was working in was approximately 15 feet by 24 feet (*id.* at 24). However, much of the floor space was occupied by generators, as well as communication and data storage hardware (*id.*). Plaintiff was directed by Brian Lopez (Lopez), an employee of nonparty Tishman Speyer, to repair water damage in the mechanical room (*id.* at 29). The work involved removing wooden panels that were approximately 10 feet off the ground in order to repair damaged soffits (*id.* at 30-31).

Plaintiff successfully removed three wooden panels. When he approached the third panel, he could not open the A-frame ladder he was working from, given the placement of the panel and lack of open space in the mechanical room, he could not fully open the ladder, but instead had to lean it against the wall (*id.* at 45-47). Plaintiff testified that he realized the danger of working from an unopened A-frame ladder, and told his coworkers: "I'm not going to do this until we have two other guys beneath me" (to help him secure the ladder) (*id.* at 46).

Both of Plaintiff's assisting co-workers held onto the ladder from the right side, as there was no room for them on the left side (*id.* at 48). As Plaintiff ascended toward the top of the

ladder, it began to shift from side to side (*id.* at 50). Standing on the second rung from the top, Plaintiff removed the panel and handed it to a coworker (*id.* at 57-59), and he was able to safely descend from the ladder (*id.* at 60).

Plaintiff's accident occurred while he was performing plaster work in an opening in the wall that he could not reach while maintaining two feet on the ladder:

“One foot was on the ladder and the other foot was on the generator to really reach to get in there. I'm above waist now in the crawl space. Once that happened, the ladder shifted underneath me, and there was a bar coming down, and I grabbed myself. All my weight was going back and then my neck snapped back all in the same motion”

(*id.* at 62).

Plaintiff filed his complaint on May 24, 2015. The complaint claims that RCPI is liable to him pursuant to Labor Law §§ 240 (1), 241 (6), as well as Labor Law § 200 and common-law negligence.

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).

The court notes initially that Plaintiff does not oppose the part of the RCPI's motion directed at his Labor Law § 200 and common-law negligence claims. Thus, those claims are dismissed as abandoned.

I. Contractual Indemnification

The lease agreement between RCPI and NBC provides that NBC, as the lessee, is:

“to indemnify, and save harmless the Landlord ... from and against all liability (statutory or otherwise) ... to which any Indemnatee may (except insofar as it arises out of the negligence ... of [RCPI]) be subject or suffer whether by reason of, or by reason of any claim for, any injury ... arising from or in connection with the use of, or from any work or thing whatsoever done in, any part of the Center ... during the term of the Lease”

(NYSCEF doc No. 97).

RCPI notes that NBC hired Nugent, Plaintiff’s employer (see NYSCEF doc No. 98, the NBC/Nugent agreement). RCPI argues that the indemnification provision plainly requires NBC to indemnify it, as this action arises out of NBC’s use of the leased premises, as well as NBC’s agreement with Nugent.

NBC argues that RCPI’s third-party complaint as against it should be dismissed, as the anti-subrogation rule shields it from having to indemnify RCPI, as they are each being defended and covered as additional insureds under an insurance policy taken out by Nugent. While NBC is correct that RCPI cannot recover against it, pursuant to the anti-subrogation rule, up to the limit of the policy under which they are both covered (*Porter v Annabi*, 65 AD3d 1322 [1st Dept 2009]), the antisubrogation rule only shields NBC up to the limit of the Kruger policy (see *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281 [1983]). Thus, NBC cross motion for dismissal of the third-party claim against must be denied as the antisubrogation rule does not definitively dispose of the contractual indemnification claim against it.

NBC also argues, in opposition to RCPI’s motion, that there is a question of fact as to RCPI’s negligence that precludes summary judgment in favor of RCPI on the issue of contractual negligence. NBC contends that RCPI’s negligence was committed through Tishman Speyer.

Thus, the question of whether Tishman Speyer is RCPI's agent is the threshold question. As the question of RCPI's negligence will ultimately be determined through the Labor Law, the court will apply the standard for agency under the Labor Law:

"A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition. Thus, a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right"

(*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]).

Here, there is at least a question of fact as to whether Tishman Speyer had authority to control the subject work. Plaintiff testified not only that a Tishman's Facilities Manager, Lopez, directed him to do the subject work, but that Lopez, when confronted by Plaintiff about the small amount of space in which to do the work, told Plaintiff "try to do the best you can, just get it done" (NYSCEF doc No. 93 at 32). Moreover, Lopez testified that "he basically managed all the NBC floors throughout the building and made sure everything was running from an operational standpoint" (NYSCEF doc No. 96). Thus, there is at least a question of fact as to whether Tishman Speyer was RCPI's agent under the Labor Law.

While Plaintiff has abandoned its section 200 and common-law negligence claims against RCPI, the court analyzes whether RCPI could be found negligent in Plaintiff's accident to resolve the question of whether RCPI's application is premature. As with the agency analysis, the standard for establishing negligence under section 200 involves an inquiry into "supervisory control," but that term is interpreted differently in this context. That is, unlike in the agency analysis, supervisory control in a section 200 context requires a showing that the authority to

control the work was actually exercised ((*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.*).

As the record here indicates that Tishman Speyer did not exercise any authority it had to control Plaintiff's work, NBC cannot show that RCPI was negligent in Plaintiff's accident. As such, the indemnification clause is triggered and it is not premature to grant RCPI summary judgment, as RCPI was not negligent. Accordingly, RCPI is entitled to summary judgment on its contractual indemnification claim as against NBC, but only as to any amount above the limit of the insurance policy taken out by Nugent.

II. 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]).

RCPI makes distinct arguments in its motion for dismissal of Plaintiff's section 240 (1) claim and its opposition to Plaintiff's cross motion for summary judgment under the statute. In support of its motion, RCPI contends that it is not a proper Labor Law defendant as an out of possession landlord. In opposition to Plaintiff's cross motion, RCPI argues that Plaintiff was the sole proximate cause of his own injuries.

In support of its argument that it is not a proper Labor Law defendant, RCPI cites to *Morton v State of New York* (15 NY3d 50 [2010]) where the Court of Appeals held that "ownership of the premises where the accident occurred--standing alone--is not enough to impose liability" (*id.* at 56). The Court of Appeals held that to be an owner pursuant to the Labor Law, there must be some showing beyond ownership, "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest" (*id.* [internal quotation marks and citation omitted]).

Here, such a nexus plainly exists as RCPI leased the premises to NBC, who hired Nugent, Plaintiff's employer. In *Sanatass v Consolidated Inv. Co., Inc.* (10 NY3d 33 [2008]), the Court of Appeals found that a sufficient nexus existed even where the tenant contracted without the owner's knowledge for the work that gave rise to the plaintiff's injury without the owner's knowledge. *Morton*, in contrast involved work, repair of a water line, that had no nexus with the landowner. As that is not the case here, and as RCPI owns the subject property and has a nexus to Plaintiff through its lease with NBC, RCPI is a proper Labor Law defendant. Thus, the branch of RCPI's motion seeking dismissal Plaintiff's section 240 (1) claim on this basis is denied.

Moreover, RCPI's argument that Plaintiff was the sole proximate cause of his own accident is unpersuasive. A worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the 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]). That is plainly not the case here, where Plaintiff expressed concerns about the safety of the project but was told to just do his best by Tishman Speyer's Lopez. Nothing in the record suggests that Plaintiff was offered a safety device that he unreasonably refused to use. Accordingly, Plaintiff was not the sole proximate cause of his injuries.

Plaintiff makes a *prima facie* showing that a statutory violation was present. Plaintiff was plainly subject to a gravity-related risk. The ladder provided to him was insufficient to protect him from that risk, even when it was supported on one side by co-workers. Plaintiff provides an expert affidavit from Robert Fuchs (Fuchs), an engineer, who stated that the accident "could have been prevented if suitable equipment was provided in the limited work space such as a scaffold or extension ladder" (NYSCEF doc No. 119, ¶ 27). The failure to provide such equipment, Fuchs concludes, was a proximate cause of the accident and [Plaintiff's] resulting injuries (*id.*, ¶ 30).

As RCPI fails to rebut Plaintiff's *prima facie* showing of entitlement to judgment as to liability under Labor Law § 240 (1), the branch of Plaintiff's cross motion seeking such relief is granted.

III. Labor Law § 241 (6)

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 predicates his Labor Law § 241 (6) claim on section 23-1.21 (e) (2) of the Industrial Code. 12 NYCRR 23-121 (e) is entitled “Ladders and ladderways; Stepladders,” and its second subsection requires that: “Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked.”

Courts have held that this regulation is sufficiently specific to serve as the predicate for a section 241 (6) violation. The record shows that this regulation was violated, as involved in Plaintiff’s accident was neither opened nor locked. Thus, Plaintiff makes a *prima facie* showing of entitlement to judgment on his section 241 (6) claim. As RCPI makes no arguments specific to

section 241 (6), and as the court has already rejected its more general arguments, RCPI fails to rebut this showing. Thus, Plaintiff is entitled to summary judgment on his section 241 (6) claim.

CONCLUSION

Accordingly, it is

ORDERED that defendant RCPI Landmark Properties, LLC's (RCPI) motion for summary judgment is granted only to the following extent:

- Plaintiff's Labor Law § 200 and common-law negligence claims are dismissed;
- RCPI is entitled to contractual indemnification from defendant/third-party plaintiff NBC above the limit of the insurance policy on which they are both additional insureds; and it is further

ORDERED that the remainder of RCPI's motion is denied; and it is further

ORDERED that NBC's cross motion for summary judgment dismissing the third-party complaint is denied; and it is further

ORDERED that Plaintiff's cross motion for partial summary judgment as to liability on his claims against RCPI pursuant to Labor Law §§ 240 (1) and 241 (6) is granted; and it is further

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: July 16, 2019

ENTER:



Hon. CAROL R. EDMED, JSC

**HON. CAROL R. EDMED
J.S.C.**