

Ramos v City of New York

2019 NY Slip Op 32691(U)

September 10, 2019

Supreme Court, Kings County

Docket Number: 517432/2016

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

JORGE RAMOS,

Plaintiff,

-against-

**THE CITY OF NEW YORK, 124 SOUTH 3 STREET
HOUSING DEVELOPMENT FUND CORPORATION,
SIMPLE CAFÉ AND RESTAURANT, BAHA DESIGN INC.
d/b/a BERLYN 65 and SERAP BAHADIR,**

Defendants.

DECISION / ORDER

**Index No. 517432/2016
Motion Seq. No. 8, 9, 10, 11
(and Motion Seq. 1
filed under 522008/2018)
Date Submitted: 7/18/19**

**124 SOUTH 3 STREET HOUSING DEVELOPMENT
FUND CORPORATION,**

Third-Party Plaintiff,

-against-

BERLYN 65 and SERAP BAHADIR,

Third-Party Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' and third party defendants' motions for summary judgment.

Papers	NYSCEF Doc.
Notices of Motion, Affirmations and Exhibits Annexed.....	<u>120-136</u>
	<u>182-201</u>
	<u>11-20</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>148-163</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>212-222</u>
	<u>229-230</u>
Reply Affirmations and Exhibits Annexed.....	<u>214-215</u>
	<u>223-224</u>
	<u>237-239</u>
	<u>243-245</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action allegedly arising out of demolition work in a storefront at 346 Bedford Avenue in Brooklyn, New York. Plaintiff has asserted causes of action under Labor Law §§ 200, 240(1) and 241(6) and common law negligence. Plaintiff claims he was injured while doing demolition work at the sole direction of Steven Roman, who hired him for the job, at defendant Simple Café and Restaurant (Simple Café), on November 2, 2015. Simple Café (which is owned by non-party Samia Behaya) leases the premises from 124 South 3 Street Housing Development Fund Corporation (hereafter 124 South 3 Street), the owner of the property.

At plaintiff's deposition, he testified that he was born and raised in Brooklyn. He completed high school in 1988. He had an assortment of jobs after he graduated high school, which he had trouble remembering the specifics of. He said he was a stock room clerk for a company named Peerless Imports. He worked as a part-time porter for NYU for four years, 2004 to 2007, and was paid \$11 an hour. His next job was not until around 2013, when he was an assistant to a now-defunct company for a year in 2013 or 2014, for which he was paid \$11 an hour. Plaintiff testified that he was hired by Steven Roman for the job that resulted in this lawsuit. He knew him "from the area" [Page 24]. He had worked for him two or three times before [Page 25]. Mr. Roman approached him on the street the day before and asked him if he wanted to come and help him. Plaintiff said "yes" and he was asked to come to the Simple Café the next day at 9:00 a.m. He did so. They had not discussed the nature of the work when he agreed to meet Mr. Roman. When he got there, they spoke to a woman whose name

he does not know and were in a storefront but he could not recall the name of the store. There was a restaurant on one side and a store on the other side, with a partition in between. At one point, Mr. Roman was using a power saw to take down the shelving along one of the walls [Page 34]. Plaintiff understood that it was going to be moved to a new store for the woman. Plaintiff testified that he was assigned by Mr. Roman to take the debris out to the sidewalk [Page 35] and deposit it in the café's green metal garbage dumpster [Page 36]. He was not asked to do anything else. He was given a pair of gloves and twine to tie up the loose items. At some point after Mr. Roman finished removing the shelving, Mr. Roman began a task of removing a large piece of clear glass from the partition between the store and the café. It was glued to the wall [Page 41]. Mr. Roman was standing on a ladder and holding a tool which plaintiff described as a "razor" to separate the glass from the wall. Plaintiff was on the other side of the partition, with his back to Mr. Roman, tying up some debris so he could take it outside when he heard a sound, which was the sound of a piece of the glass breaking off, and then, in the same instant, the piece of the glass fell on plaintiff's hand, causing his injury [Page 39]. He testified that he did not know if this piece of glass was going to be moved to the new store or discarded.

Ms. Bahadir, defendant and third-party defendant, was also deposed. She testified that her business is called Bahadir Design d/b/a Berlyn 65. At the time of the plaintiff's accident, she was the only employee of the business. It is a shop that sells crafts, jewelry, accessories and textiles. The shop is on Grand Street, and opened on November 11, 2015. Before that, the shop was at 346 Bedford Avenue, the location of plaintiff's accident. She sublet the prior space from the owner of Simple Café, who was

a friend of hers. She did not have anything built when she moved into the space at Simple Café, and the shelving was already there. She did not put in the partition or the glass in the partition. Steve Roman had at some point introduced himself to her as a “handyman” and gave her a business card. She then saw him from time to time around the neighborhood. He lived near the store. She ran into him on the street in October of 2015 and asked him if he could help her move her shop [Page 63]. She then called him and he came to her shop to make the arrangements. She asked him to move her inventory, which she would put into boxes, and he asked for \$200. She had a dolly, and he was to move the boxes by pulling the dolly to the new location with the boxes on it, which was three blocks away. She picked November 2 to move, as it was a Monday, and the café was closed on Mondays, so nobody would be inconvenienced. She only moved boxes. She did not move any shelves. She had the shelves in her new store built for that store [Page 75-76]. Mr. Roman came at 9:00 a.m. and she showed him what to move and then she left and went to the new store. He came to the new store with her boxes, which took several trips, and when he finished, she paid him in cash. She never saw plaintiff. She wasn’t asked if she went back to the store on Bedford Avenue to lock the door.

The owner of Simple Café, Samia Bahaya, was also deposed. She testified that no demolition or construction was done in the storefront on the day of plaintiff’s accident.

Third-Party Defendants Berlyn 65 and Serap Bahadir move (Seq. # 8) for summary judgment dismissing plaintiff’s Labor Law §§ 240(1) and 241(6) claims¹ and

¹Prior to the consolidation, the claims against Berlyn 65 and Bahadir were solely in the third-party complaint.

dismissing third-party plaintiff 124 South 3 Street's third-party claims and Simple Cafe's cross claims against them. Berlyn 65 and Bahadir contend that Labor Law § 240(1) is not applicable because the glass that fell and injured plaintiff was not being hoisted or secured at the time, nor did it require securing for purposes of the undertaking; that the Industrial Code provisions plaintiff relies upon for his 241(6) claim are not applicable; and that the third party claims and cross claims against them should be dismissed as they owed no duty of care to plaintiff and there was no oral or written agreement to indemnify Simple Café. Her sublease with Simple Café was oral [EBT Page 46].

Defendant/Third-Party Plaintiff 124 South 3 Street cross-moves (Seq. # 9) to dismiss all of plaintiff's claims against it, or for summary judgment on its third-party claims.² 124 South 3 Street also contends that Labor Law § 240(1) is inapplicable to plaintiff's accident. It also argues that it was not advised of or aware of any demolition taking place in the store on November 2, 2015. In addition, 124 South 3 Street maintains that the Industrial Code provisions upon which plaintiff relies for his claims under Labor Law § 241(6) are inapplicable, and that the plaintiff's Labor Law § 200 claims should be dismissed against it as the evidence establishes that it did not supervise or control the plaintiff's work. Alternatively, 124 South 3 Street seeks summary judgment on its third-party claims for common law indemnification against Berlyn 65 and Bahadir and common law and/or contractual indemnification on its cross claim against Simple Café.

²A duplicate copy of the cross motion (# 9) was apparently also e-filed as motion sequence number 10 (NYSCEF Doc.165-180).

Defendant "Simple Café"³ moves (Seq. # 11) for summary judgment dismissing plaintiff's complaint and all cross-claims against it. Simple Café argues that it is not an owner, agent, or contractor under the Labor Law and it did not hire plaintiff or his employer to perform any work at the subject location. Further, Simple Café contends that Labor Law § 240(1) is inapplicable, that the Industrial Code provisions cited in support of plaintiff's Labor Law § 241(6) claims are inapplicable and that Simple Café had no involvement with the work and did not supervise or control it, barring the Labor Law § 200 and common law negligence claims. Further it seeks dismissal of all cross claims against it, as Simple Café was not negligent, and in addition, that 124 South 3's motion for contractual or common law indemnification should be denied as there is no evidence that Simple Café hired, supervised or was in any way connected to the alleged work performed by plaintiff, so that the indemnification clause in the lease was not triggered.

Plaintiff opposes the motions for summary judgment and argues that accepting his version of the events as true, which he acknowledges are contested and therefore he claims this is why he does not himself seek summary judgment, there are issues of fact precluding summary judgment to defendants. He claims that a falling piece of a glass pane, which required securing for the purpose of the undertaking, supports a Labor Law § 240(1) claim. Plaintiff's counsel asserts that the glass was not being demolished but was being carefully removed with the intent to preserve it, similar to the built-in shelves that were being removed. Further, he maintains that there were

³The lease, E-file Doc # 221, states that the tenant is SNBP, Inc., and Simple Café's answer to the complaint is on behalf of "SNBP, Inc., doing business as Simple Café."

violations of Industrial Code sections 23-3.3(b)(3) and (c), which supports his Labor Law § 241(6) claim.

Finally, plaintiff moved (Seq. # 12) to consolidate this action with another action that he had commenced for the same accident, against Baha Design Inc., Baha Design Inc. d/b/a Berlyn 65 and Serap Bahadir, bearing Index No. 522008/2018. The motion was granted after oral argument by a July 18, 2019 order. The defendants in the now consolidated action, Baha Design Inc., Baha Design Inc. d/b/a Berlyn 65 and Serap Bahadir, brought a separate motion (Seq. # 1 under Index No. 522008/2018), for summary judgment dismissing the complaint against them, as well as and any cross claims. That motion is decided herewith.

The court notes that the City of New York was dismissed from this action by an order dated July 7, 2017 on motion Seq. # 2. Thus, all of the remaining defendants and third-party defendants in the consolidated action are now moving for summary judgment dismissing all claims as against it/him/her.

Discussion

The court first considers Labor Law § 240 (1), which states, in relevant part, that: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; see also *Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required “proper protection” against elevation-related risks is non-delegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision or control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both “a violation of the statute and that the violation was a proximate cause of his injuries” (*Skalko v Marshall's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; see also *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer*, 65 NY2d at 524.

Thus, "Labor Law § 240 (1) imposes a non-delegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for the protection of workers subject to the risks inherent in elevation-related work who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992][citations omitted]). This statutory duty is not diminished by a worker's contributory fault (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), and is imposed regardless of whether the owner, general contractor, or statutory agent with the authority to control, actually exercises supervision or control over the plaintiff's work (*see Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 259 [1st Dept 2001]; *Campanella v St. Luke's-Roosevelt Hosp.*, 247 AD2d 294, 295-296 [1st Dept 1998]). "Proper protection" requires that the device must be appropriately placed or erected so that it would have safeguarded the employee (*see Bland v Manocherian*, 66 NY2d 452, 460 [1985]), and that the furnished device itself must be adequate to protect against the hazards entailed in the performance of the particular task to which the employee was assigned (*see Bland v Manocherian*, 66 NY2d at 461).

As the Court of Appeals explained in *Fabrizi v 1095 Ave. of Americas, L.L.C.* (22 NY3d 658, 662-663 [2014] [internal quotation marks and citations omitted]):

In order to prevail on summary judgment in a section 240(1) "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking.

Here, the record demonstrates that plaintiff and his claimed employer, non-party Steven Roman, were not engaged in a protected activity under the Labor Law, insofar as they were simply moving Baha Design Inc./Berlyn 65/Serap Bahadir's boxes of

merchandise to a new store location, and no construction or demolition work was contracted for. Moreover, even if the plaintiff's work, insofar as he claims Steven Roman must have been asked to remove the glass and bring it to the new store location, is considered demolition or an alteration (*see Kharie v S. Shore Record Mgmt., Inc.*, 118 AD3d 955, 956 [2d Dept 2014]) and plaintiff's version of the events is accepted as true, the court finds that 1) plaintiff was only tasked with removing debris and 2) the pane of glass that was purportedly being removed from the wall when a piece of it broke off was not an object that required securing for purpose of the undertaking (*see Maldonado v AMMM Properties Co.*, 107 AD3d 954, 955 [2d Dept 2013] ["Here, the glass pane that caused the plaintiff's injuries was slated for demolition at the time of the accident, and the defendants established, prima facie, that the glass pane was not an object that required securing for the purposes of the undertaking, that is, the demolition"]; *see also Vatavuk v Genting New York, LLC*, 142 AD3d 989, 990 [2d Dept 2016] ["The defendants established their prima facie entitlement to judgment as a matter of law with evidence that the piece of board which struck the plaintiff was not in the process of being hoisted or secured and did not require securing for the purpose of being installed, and that the object did not fall on the plaintiff due to the lack or failure of a device prescribed by Labor Law § 240 (1)"]. Here, the glass was affixed to the wall, and the undertaking was to remove it, so that securing it would be contrary to the purpose of the undertaking (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11 [2011]), regardless of whether it was going to be demolished or preserved. Indeed, one of the safety devices enumerated in Labor Law § 240(1) would not have been necessary or even expected under the circumstances (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 8, 11; *Honeyman v Curiosity Works, Inc.*, 154

AD3d 820, 821 [2d Dept 2017]" [The defendant's evidence established the absence of a causal nexus between the injured plaintiff's injury (when two panels comprising the walls of an exhibition booth fell on him) and a lack or failure of a device prescribed by Labor Law § 240 (1)"]; *Zamora v 42 Carmine St. Assocs., LLC*, 131 AD3d 531, 532 [2d Dept 2015] [defendant "demonstrated its prima facie entitlement to judgment as a matter of law by submitting evidence which established the absence of a causal nexus between the plaintiff's injury and a lack or failure of a device prescribed by section 240(1)" when a glass windowpane plaintiff was installing broke]; *Carrasco v Weissman*, 120 AD3d 531, 533 [2d Dept 2014] [same]; *Mendez v Jackson Dev. Grp., Ltd.*, 99 AD3d 677, 678 [2d Dept 2012] [same]]. Indeed, the accident is more akin to those in *Narducci v Manhasset Bay Assoc.* (96 NY2d 259 [2001] [piece of glass falling from a nearby window and a light fixture falling while being installed in a ceiling grid]) and *Fabrizi v 1095 Ave. of Americas* (22 NY3d 658 [2014] [permanently affixed conduit falling from a compression coupling-which was not a section 240(1) safety device]), than to *Quattrocchi v F.J. Sciame Constr.* (44 AD3d 377 [1st Dept 2007], *affd* 11 NY3d 757 [2008] [wooden planks set atop temporary swinging doors to act as a shelf while installing an air conditioner]) and *Outar v City of New York* (286 AD3d 671 [2d Dept 2001], *affd* 5 NY3d 731, 732 [2005] [unsecured dolly, used in plaintiff's work]).

Turning to plaintiff's claims under Labor Law § 241(6), the Industrial Code provisions

which plaintiff relies⁴ on in support his claim, § 23-3.3(b)(3) and 23-3.3(c),⁵ relate to a building's structural stability during demolition and are inapplicable to the purported removal of a pane of glass (see *Maldonado v AMMM Props. Co.*, 107 AD3d at 955 ["The defendants demonstrated that the provisions of 12 NYCRR 23-3.3 (b) (3) and (c), relied on by the plaintiff, are inapplicable, as the hazard arose from the plaintiff's actual performance of the demolition work itself, rather than from structural instability caused by the progress of the demolition"]; see also *Garcia v Mkt. Assocs.*, 123 AD3d 661, 663 [2d Dept 2014] [same]; *Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 93 [1st Dept 2012] [12 NYCRR 23-3.3(b)(3), (c) not applicable to a mirrored glass panel that broke and cut worker's hand when he wedged spatula between panel and drywall and

⁴Plaintiff has abandoned reliance on the other Industrial Code provisions cited in his bill of particulars (see *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal]).

⁵12 NYCRR 23-3.3 provides in pertinent part:

- (a) Application. The provisions of this section shall not apply to mechanical means of demolition.
- (b) Demolition of walls and partitions.

* * *

(3) Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

* * *

- (c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

deliberately attempted to loosen panel by striking spatula with hammer, even assuming it constituted demolition work)]⁶.

Moreover, Simple Café, Berlyn 65 and Serap Bahadir are not proper Labor Law defendants and the plaintiff's complaint must be dismissed as to them (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). In addition, plaintiff acknowledged that his work was solely supervised by Ramon, and as the accident occurred as a result of the means and methods of the work, there is no basis for the property owner's liability under Labor Law § 200 or common law negligence. Absent supervision or control over plaintiff's work, where the accident arose out of plaintiff's own means and methods, there is no liability 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]). Indeed, plaintiff's opposition does not argue otherwise.

Further, insofar as Berlyn 65 and Bahadir breached no duty to plaintiff, and in fact did not know he was hired by Roman, the property owner's third-party claims and cross claims against Berlyn 65 and Bahadir for common law indemnification and contribution must be dismissed. Common law indemnification is available to a party who is solely vicariously liable from an actually negligent party (see *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378-378 [2011]; *Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1, 6 [1974]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). On the other hand, the indemnity provision in the lease between Simply Café

⁶A Labor Law § 240(1) claim was dismissed by the motion court and was not the subject of the appeal.

and 124 South 3 Street turns on acts or omissions of the tenant *or its undertenants*, and contrary to Simple Café's claim, the indemnity provision does not require that those acts or omissions constitute negligence (*see Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 503 [2d Dept 2014] ["the indemnification clause does not, by its terms, limit indemnification only to claims arising out of the negligence of Marble or JP Marble, or their employees in the performance of the work"]). Inasmuch as 124 South 3 Street has incurred expenses in the form of defense costs in connection with Simple Café's undertenant's acts in hiring Ramon to do work at the premises, 124 South 3 Street is entitled to be indemnified for its defense costs. Consequently, 124 South 3 Street's cross claims for contractual indemnification against Simple Café cannot be dismissed by the court. However, 124 South 3 Street only seeks summary judgment on its cross claims for contractual indemnification as the alternative relief sought if the complaint is not dismissed as against it.

Accordingly, it is

ORDERED that the motions and cross motion are granted to the extent of dismissing the complaint, and it is further

ORDERED that all of defendants' cross claims and all third-party claims are dismissed, and it is further

ORDERED that motion sequence # 10 is denied as duplicative of motion sequence # 9.

This constitutes the decision and order of the court.

Dated: September 10, 2019

ENTER :



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court