

Dicembrino v Verizon N.Y. Inc.
2019 NY Slip Op 32776(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 161670/2014
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 161670/2014

ALBERTO DICEMBRINO, and STEFANI
DICEMBRINO,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 003

- v -

VERIZON NEW YORK INC.,435 WEST 50
PROPERTY, L.P., ARROW ALLIANCE
CONSTRUCTION CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 97-150, 159-160
were read on this motion to/for partial summary judgment.

By notice of motion, defendants/third-party plaintiffs Verizon New York Inc. and Arrow
Alliance Construction Corp. (collectively, defendants) move for partial summary judgment
dismissing plaintiffs' Labor Law §§ 241 and 200 and common law claims and all cross claims
against them, and granting them contractual and/or common law indemnification as against
third-party defendants James F. Volpe Electric Co. Plaintiffs oppose, and Volpe opposes the
motion seeking a judgment against it.

By notice of cross motion, Volpe moves for an order granting it partial summary
dismissal of plaintiffs' Labor Law §§ 241 and 200 and common law claims and all cross claims
against them. Plaintiffs oppose.

By notice of cross motion, plaintiffs move for partial summary judgment on liability as to
their Labor Law § 241(6) claims and setting the matter down for a trial on damages. Defendants
and Volpe oppose.

I. PERTINENT BACKGROUND

The facts underlying plaintiff Alberto Dicembrino's (Dicembrino) accident are set forth in a decision and order dated May 25, 2016, wherein plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) was denied. In the decision, it was found that an issue of fact existed as to whether plaintiff's careless conduct constituted the sole proximate cause of his injuries. (NYSCEF 59). That finding was based on Dicembrino's deposition testimony wherein he described his accident as having occurred when, while he worked alone at the top of a 12-foot A-frame wooden ladder, he was lubricating and feeding it through a pipe which produced asbestos and insulation debris. After approximately an hour, he descended from the ladder while carrying a five-gallon bucket of the lubricant and fell when he missed the fourth rung from the bottom. According to plaintiff, he had slipped on the debris that was produced from his work, causing him to miss the rung. That decision was affirmed on appeal. (*See Dicembrino, et al. v Verizon New York Inc., et al.*, 149 AD3d 541, 542 [1st Dept 2017] [observing that at his deposition, Dicembrino did not attribute fall to any inadequacy of ladder]).

II. DEFENDANTS'S MOTION

A. Dismissal of plaintiffs' claims

1. Labor Law § 200 and common law negligence claims

The evidence presented, including Dicembrino's testimony, establishes that defendants did not exercise control or supervision over the manner or method of his work, nor did they provide him with equipment or safety devices. To the extent that the condition of the ladder was dangerous, Dicembrino's testimony confirms that the ladder was provided and maintained by his employer, Volpe, and that he had not complained about the ladder to defendants, but only to his

employer, and defendants deny having received any complaints about the ladder. Moreover, at oral argument, plaintiffs' counsel conceded that defendants had exercised no direct supervision over Dicembrino. (NYSCEF 161). Defendants thus establish, *prima facie*, that they may not be held liable on plaintiffs' Labor Law § 200 and common law negligence claims, and plaintiffs raise no triable issue. (*Djuric v City of New York*, 172 AD3d 456 [1st Dept 2019] [construction manager held not liable as it did not have authority to supervise or control work at issue, and defendants showed lack of notice of defect]).

That defendants may have held safety meetings during the project at issue is insufficient. (*Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404 [1st Dept 2018] [although defendant had authority to stop work for safety reasons and conducted weekly safety meetings, no triable issue raised thereby as to whether it exercised requisite degree of supervision or control over work at issue]).

2. Labor Law § 241(6) claim

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Moreover, an owner is absolutely liable for the negligence of a contractor and subcontractor, and a contractor may be held liable for the negligence of a subcontractor, even if it neither supervised nor controlled the work site. A party to whom supervision is delegated may also be held liable. (*Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 434-435 [2015]).

While defendants deny that any of the Industrial Code provisions referenced by plaintiffs in their pleadings is applicable, plaintiffs address only Industrial Code §§ 12 NYCRR § 23-1.7(d), 23-1.16, 23-1.21(b)(3)(iv), 23-1.21(e)(3), and 23-5.1(a)-(k). Thus, they are deemed to have waived

reliance on any other violations as a predicate for their Labor Law § 241(6) claim.

a. Violation of 12 NYCRR § 23-1.7(d) (slipping hazards)

Employers 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 or any foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Plaintiffs contend that the ladder was covered in old monocoat and other debris, and thus rendered the ladder unsafe. Defendants deny that the debris constitutes a hazard contemplated by this industrial code section as Dicembrino produced the debris as he worked. They also observe that Dicembrino never testified that the monocoat had caused him to slip, and that he advances the allegation for the first time in an affidavit submitted after his deposition.

As the water and debris which fell on the ladder was created by Dicembrino as he performed the work at issue, it does not constitute a covered hazard. (*See e.g., Kowalik v Lipschutz*, 81 AD3d 782 [2d Dept 2011] [where substance naturally results from work being performed, it is generally not considered foreign substance]; *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789 [2d Dept 2008], *lv denied* 12 NY3d 709 [2009] [wet plastic and asbestos fibers on which plaintiff slipped were integral part of work and thus not a foreign substance]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619 [2d Dept 2003] [demolition debris on which plaintiff slipped not type of foreign substance contemplated by section 23-17(d)]).

In first mentioning monocoat in his affidavit, Dicembrino creates a feigned issue of fact. (*See Ramos v Michael Epstein Sports Prods., Inc.*, 173 AD3d 1079 [2d Dept 2019] [plaintiff's affidavit presented feigned issue of fact designed to avoid consequences of earlier testimony and thus insufficient to raise triable issue]).

b. Violation of 12 NYCRR § 23-1.21(b)(3)(iv) (General requirements for ladders)

(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: . . . (iv) if it has any flaw or defect of material that may cause ladder failure.

Plaintiffs' allegation that the ladder was covered in slippery monocoat is rejected (*supra*, II.A.2.a.), and there is no other allegation that the ladder had a flaw or defect. (*See Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593 [1st Dept 2014] [industrial code section inapplicable where no evidence ladder was not in good condition]).

c. Violation of 12 NYCRR § 23-1.21(e)(3) (Stepladders)

(3) Stepladder footing. Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means.

Absent evidence that the ladder was defective and/or that it swayed or moved before the accident, this subsection is inapposite. (*See Croussett v Chen*, 102 AD3d 448 [1st Dept 2013] [code subsection inapplicable as plaintiff testified that ladder worked properly]; *Cunningham v Alexander's King Plaza, LLC*, 22 AD3d 703 [2d Dept 2005] [as plaintiff testified that ladder did not move before or after accident, alleged failure to secure ladder not proximate cause of accident]; *Enderlin v Hebert Indus. Insulation*, 224 AD2d 1020 [4th Dept 1996] [purpose of subsection is to prevent hazards arising from movement or swaying of unsecured stepladders, and no evidence that stepladder moved before accident]).

In any event, there is no evidence that Dicembrino stood more than 10 feet above the footing when he slipped. (*See Vega v Renaissance 643 Broadway, LLC*, 103 AD3d 883 [2d Dept 2013] [subsection inapplicable as plaintiff was standing on step less than 10 feet above footing when he fell]).

- d. Violation of 12 NYCRR §§ 23-1.16 and 23-5.1
23-1.16. Safety belts, harnesses, tail lines and lifelines.
23-5.1. General provisions for all scaffolds.

There is no evidence offered that the lack of a harness or scaffold caused the accident or that either was required for the work Dicembrino performed. (*See e.g., Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018] [no allegation or evidence that accident caused by inadequate railings on scaffold]; *Varona v Brooks Shopping Centers LLC*, 151 AD3d 459 [1st Dept 2017] [plaintiff did not fall off scaffold and submitted no evidence injuries were direct consequence of failure to prove adequate protection against elevation-related risk]; *Spenard v Gregware Genl. Contracting*, 248 AD2d 868 [3d Dept 1998] [nothing in industrial code regulations suggested that protective devices should have been provided under circumstances at issue]; *see also Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578 [1st Dept 2012] [section 1.16 inapplicable as defendant provided plaintiff with no protective devices covered by section; section set forth standards for use of covered devices]).

B. Defendants' claims against Volpe

1. Subcontract

The subcontract between defendants and Volpe provides that, in consideration of the subcontract, and “to the fullest extent permitted by law,” Volpe shall defend and indemnify defendants at Volpe’s sole expense

from and against all liability or claimed liability for bodily injury or death to any person(s) and for any and all property damage or economic damage, including all reasonable attorney fees, disbursements, and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by negligence of the Indemnified parties.

(NYSCEF 111).

2. Contentions

Defendants argue that given the clear language of the indemnity agreement, Volpe must indemnify them as it is undisputed that Dicembrino's accident arose out of or resulted from Volpe's work on the project. (NYSCEF 98.) They also observe that Volpe's insurance carrier reviewed plaintiffs' complaint and concedes that Volpe owes defendants contractual indemnity and will defend them. (NYSCEF 119). Moreover, given the lack of evidence of negligence on their part, and evidence that Volpe may have been negligent, they claim entitlement to common law indemnification as well.

Volpe contends that the indemnity clause is unenforceable as it requires full indemnity even if defendants are found partially negligent, in violation of General Obligations Law § 5-322.1(1). It asserts that defendants have not proven themselves free of negligence and that there is evidence that they conducted safety meetings at which proper use of ladders was discussed. It does not address its insurance carrier's letter. (NYSCEF 134).

In reply, defendants argue that the phrase "to the fullest extent permitted by law" renders the indemnity agreement valid and enforceable. (NYSCEF 138).

3. Analysis

As the indemnity agreement provides that Volpe must indemnify defendants to the fullest extent permitted by law and excludes indemnity if defendants are negligent, the contract is enforceable. (*Dutton v Charles Pankow Builders, Ltd.*, 296 AD2d 321 [1st Dept 2002] [where language provided that indemnity was required to fullest extent permitted by law and excluded liability by general contractor's negligence, indemnity agreement enforceable]).

Moreover, nothing in the agreement requires a finding of negligence by Volpe, but only that the injury arise out of its work on the project, which it did, and defendants establish that they

are free from active negligence given the dismissal of plaintiffs' Labor Law §§ 241(6) and 200 and common law negligence claims against them. (*See Smith v Broadway 110 Developers, LLC*, 80 AD3d 490 [1st Dept 2011] [judgment on indemnity claim granted as plaintiff's claims arose from work performed by another defendant, no evidence of negligence by defendants, and court had dismissed Labor Law § 200 and common law negligence claims against defendants]).

While there is a triable issue as to whether defendants may be held liable pursuant to Labor Law § 240(1) (*supra*, I.), that liability would only be vicarious, and thus does not defeat defendants' entitlement to indemnity from Volpe. (*Martinez-Gonzalez v 56 W. 75th St., LLC*, 172 AD3d 616 [1st Dept 2019] [defendants entitled to contractual indemnity from plaintiff's employer, even though plaintiff established violation of Labor Law § 240(1), as defendants not involved in plaintiff's work and liability to plaintiff strictly vicarious]).

III. VOLPE'S MOTION

A cross motion may not be brought when the relief sought therein is not sought against the moving party on the initial motion. Thus, Volpe's cross motion, wherein it seeks dismissal of plaintiffs' claims and seeks no affirmative relief against defendants as the initial moving parties, is improper. (*See Hennessey-Diaz v City of New York*, 146 AD3d 419 [1st Dept 2017] [defendant's purported cross motion was improper vehicle for seeking relief from nonmoving party]; *Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013] [as cross motion was directed at complaint and not to cross claims asserted by moving party, it was not proper cross motion]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2^d Dept 2005] [defendant improperly cross-moved on summary judgment by attempting to piggyback on codefendant's motion for summary judgment and plaintiff was not moving party]).

In any event, Volpe makes no arguments as to why plaintiffs' claims should be

dismissed.

IV. PLAINTIFFS' MOTION

As successive motions for summary judgment are disfavored, and absent any allegation that new facts or evidence are at issue or an explanation for filing another motion, plaintiffs' motion for summary judgment is denied. (*Jones ex rel. Cline v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010] [successive summary judgment motion should not be entertained absent newly discovered evidence or other adequate justification]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendants Verizon New York Inc. and Arrow Alliance Construction Corp. is granted to the extent of: (1) dismissing plaintiffs' Labor Law §§ 241(6) and 200 and common law negligence claims and all cross claims against them; and (2) granting judgment on their claims for contractual and/or common law indemnification as against third-party defendants James F. Volpe Electric Co; it is further

ORDERED, that Volpe's cross motion for an order granting it partial summary dismissal of plaintiffs' Labor Law §§ 241 and 200 common law claims and all cross claims against them is denied; and it is further

ORDERED, that plaintiffs' motion for summary judgment is denied.

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BARBARA JAFFE, J.S.C.

9/20/2019
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE