

Brightman v Rudin Mgt. Co., Inc.
2019 NY Slip Op 33091(U)
October 18, 2019
Supreme Court, New York County
Docket Number: 150495/2016
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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LISA BRIGHTMAN,

Plaintiff,

-against-

Index No. 150495/2016
Motion Seq. Nos. 005 and
006

DECISION AND ORDER

RUDIN MANAGEMENT CO., INC. RUDIN MGMT
CO., INC., AAF 32 6TH CO. LLC, RUDIN 32 AA
ASSOCIATES, LLC, THEODORE WILLIAMS
CONSTRUCTION COMPANY, LLC, ANTONIO
LEO ARCHITECTS, TRIBECA ENTERPRISES,
LLC, TRIBECA FILM INSTITUTE, TRIBECA
FILM FESTIVAL NYC, LLC, TRIBECA FILM
FESTIVAL INTERNATIONAL, LLC,

Defendants.

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Hon. Carol R. Edmead

In a Labor Law action, defendants Rudin Management Co. (Rudin Management), Inc., Rudin 32 AA Associates, LLC (together, the Rudin defendants) and 32 Sixth Avenue Company LLC (32 Sixth) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Lisa Brightman's (Plaintiff, or Brightman) complaint and all cross claims against them (motion seq. No. 005). The Rudin defendants and 32 Sixth also seek summary judgment on their contractual indemnification claims against defendants Theodore Williams Construction Company, LLC (Theodore Williams Construction) and Tribeca Film Festival, LLC (Tribeca). The Rudin defendants and 32 Sixth also seek leave, pursuant to CPLR 2004, granting 32 Sixth Leave to interpose an amended verified answer and compelling all parties to accept service of the amended answer. Plaintiff, as well as Tribeca, Theodore Williams Construction and defendant Antonio Leo Architects (together, the Tribeca defendants) oppose the motion.

Plaintiff moves for partial summary judgment as to liability on her Labor Law § 240 (1) claim (motion seq. No. 006). The Rudin defendants and 32 Sixth, as well as the Tribeca defendants, oppose the motion. The motions are consolidated for disposition.

BACKGROUND

On December 9, 2015, Plaintiff was working as an electrician for nonparty ADCO Electrical (ADCO) on the 27th floor of a building located at 32 Sixth Avenue. She was working on a renovation project in a building located at 32 Sixth Avenue in Tribeca. 32 Sixth owns the premises. Rudin is a management company with certain responsibilities on the premises pursuant to a management agreement between Rudin and 32 Sixth. Tribeca rents the 27th floor pursuant to a lease agreement with 32 Sixth.

Tribeca initiated the subject renovation work by entering into a contract with Theodore Williams Construction, by which the latter agreed to be the general contractor on the project. Subsequently, Theodore Williams Construction hired ADCO to perform electrical and fire alarm work on the renovation project.

On the day of her accident, Brightman was tasked with splicing cable wires in the ceiling (Brightman tr at 20-21, NYSCEF doc No. 114). To perform this work, Plaintiff used a six-foot, A-frame ladder (*id.* at 22). Plaintiff had to move the ladder intermittently as the work progressed (*id.* at 31). As she stood on the ladder, her head was above the ceiling grid so she could reach the junction box which housed the wires that she was splicing (*id.* at 37-38).

While splicing wires, Plaintiff felt the ladder shift:

“I was working and then I felt the ladder just go, and I instantly just grabbed -- I didn't want to fall to the floor, so I grabbed the first thing I could see, which was this black pipe. And I was hanging there, and I screamed; I said ‘Help,’ you know. I think it was more like an “AHHHH” scream. And it seemed like forever I was hanging there, but I don't know how long. Then my co-workers came over and lifted the ladder to help me get down”

(*id.* at 42-43).

Thus, Plaintiff did not know whether the ladder tipped over or remained in a standing position, as she concentrated on hanging onto pipe (*id.* at 45, 188-189). “All I know,” plaintiff testified, “is the ladder came out from underneath me.” Theodore Williams Construction, LLC, Antonio Leo Architects, and Tribeca Film Festival (together, the Tribeca defendants), in their opposition to Plaintiff’s motion for partial summary judgment, submit an affidavit from Billy Connolly (Connolly). Connolly stated:

“While I did not see the accident, as I was not facing [Plaintiff] when it occurred, I heard her yell and immediately went to where she was working. I was at her position within seconds. Plaintiff was hanging with both arms from a black metal pipe located within the ceiling. The ladder she was using had not fallen over and was still standing up. To the best of my recollection, plaintiff still had a portion of her foot on the ladder, and never fell to ground. After getting to plaintiff, a co-worker and I placed the ladder completely under her feet and she proceeded to walk down the remaining rungs to the floor”

(NYSCEF doc No 135).

Plaintiff alleges that she was injured while hanging from the pipe. Plaintiff filed her complaint on January 20, 2016, alleging that defendants are liable under Labor Law §§ 200, 240 (1), and 241 (6).

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 § 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 arose through the methods and materials she used to do her work. Thus, Rudin and 32 Sixth make a *prima facie* showing through Plaintiff’s own testimony that she did not take direction from any non-ADCO personnel. Moreover, Plaintiff has abandoned her Labor Law § 200 claim by failing to address it in her opposition (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Accordingly, the branch of Rudin and 32 Sixth’s motion seeking dismissal of Plaintiff’s section 200 claim is granted.

II. 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 argues that defendants have violated three Industrial Code regulations: 12 NYCRR § 23-1.21 (b) (1), 12 NYCRR § 23-1.21 (b) (3), 12 NYCRR § 23-1.21 (b) (4) (iv).

12 NYCRR § 23-1.21 (b) (1)

12 NYCRR § 23-1.21 (b) is entitled a "Ladders and ladderways; General requirements for ladders" and its first subsection provides: "Strength. Every ladder shall be capable of

sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.”

Rudin and 32 Sixth argue that this regulation is not applicable, as Plaintiff is not alleging that her accident arose from a deficiency in the strength of the ladder. As Plaintiff fails to raise a question of fact as to whether an insufficiency of strength in the ladder was involved in her accident, the branch of Rudin and 32 Sixth’s motion seeking dismissal of allegations related to 12 NYCRR § 23-1.21 (b) (1) must be granted.

12 NYCRR § 23-1.21 (b) (3)

The third subsection of 12 NYCRR § 23-1.21, entitled “Maintenance and replacement,” provides:

“All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: (i) If it has a broken member or part. (ii) If it has any insecure joints between members or parts. (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness. (iv) If it has any flaw or defect of material that may cause ladder failure.”

Initially, this regulation is sufficiently specific to serve as a predicate to liability under section 241 (6). Rudin and 32 Sixth argue that it is inapplicable, as the subject ladder was in a safe condition, based on Plaintiff’s own testimony. Plaintiff, however, alleges that the ladder lacked functioning footings, which raises a question of fact as to the applicability of the regulation. Thus, the branch of Rudin and 32 Sixth motion that seeks dismissal of Plaintiff’s allegations related to 12 NYCRR § 23-1.21 (b) (3) must be denied. As a corollary, the branch of Rudin and 32 Sixth’s motion that seeks dismissal of Plaintiff’s section 241 (6) claim must be denied.

12 NYCRR § 23-1.21 (b) (4) (iv)

12 NYCRR § 23-1.21 (b) (4) is entitled “Installation and use” and its fourth subsection provides:

“When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.”

Rudin and 32 Sixth correctly point out this regulation is inapplicable, as it refers to leaning ladders rather than A-frame ladders, such as the one Plaintiff was using at the time of her accident. Accordingly, the branch of Rudin and 32 Sixth’s motion that seeks dismissal of allegations relating to 12 NYCRR § 23-1.21 (b) (4) (iv) must be granted. Moreover, all allegations relating to Industrial Code violations, other than those relating to 12 NYCRR § 23-1.21 are dismissed as abandoned as Plaintiff only discusses 12 NYCRR § 23-1.21 in her opposition papers.

III. 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]).

Plaintiff argues that her fall from an unsecured ladder establishes a *prima facie* violation of the statute. Plaintiff relies, among others, on *Devlin v Sony Corp. of Am.* (237 AD2d 201 [1st Dept 1997]), which held that “[i]t is well settled that the failure to secure a ladder to insure that it remains stable and erect while the plaintiff was working on it constitutes a violation of Labor Law § 240 (1) as a matter of law” (*id.* at 201 [internal citation and quotation marks omitted]).

Both Rudin and 32 Sixth, as well as Tribeca, Theodore Williams Construction, and Antonio Leo Architects rely, in opposition, on *Campos v 68 E. 86th St. Owners Corp.* (117 AD3d 593 [1st Dept 2014]). In *Campos*, which involved a worker’s fall from an A-frame ladder, the First Department held that summary judgment was inappropriate where there were questions of fact relating to the way the accident happened and as to the plaintiff’s credibility:

“The record before us demonstrates the existence of triable issues of fact as to how plaintiff’s accident occurred, and it cannot be concluded, as a matter of law, that the alleged failure to provide him with proper protection proximately caused his injuries. Plaintiff testified that he fell backwards and the ladder forward, and submitted an affidavit in which he stated that the ladder suddenly went forward and he simultaneously fell backwards, and that he did not become dizzy or lose his balance. However, plaintiff also testified that he opened the ladder, locked it and checked that it was sturdy, that he was not experiencing any problems with the ladder while he was on it, that he did not remember how he fell off the ladder or know why he fell off, and that he did not feel the ladder move before he fell. When asked if remembered or knew if the ladder shook or wobbled, plaintiff responded, ‘No.’ Furthermore, plaintiff’s employer testified that he situated the

ladder immediately before plaintiff's fall, locked the braces and climbed it himself, and that when he went back into the room after plaintiff fell, the ladder was in the same place as before the accident and was not on the ground, and that plaintiff did not say that there was anything wrong with the ladder that caused him to fall. These contradictions raise credibility issues which cannot be resolved on a motion for summary judgment"

(*id.* at 594).

Campos does not explicitly overrule *Devlin* and the line of cases that holds that a fall from an unsecured ladder is *prima facie* evidence of a violation of the statute (*compare Ross v 1510 Assoc. LLC*, 106 AD3d 471, 471 [1st Dept 2013] [holding that, where the plaintiff fell when an A-frame tipped over after it shifted on uneven floor, the plaintiff was entitled to summary judgment under the statute, as "[t]he accident involved an elevation-related risk, and plaintiff's injuries were proximately caused, at least in part, by defendants' failure to provide him with proper protection"']). *Campos* can be read together with the *Devlin/Ross* line of cases by noting that the Court in *Campos* focused on the inconsistency of the plaintiff's testimony as to how the fall happened and ultimately denied summary judgment on the basis that there were issues of fact as to the plaintiff's credibility. In other words, the plaintiff's own testimony raised questions of fact as to whether his accident was proximately caused by an insufficiency of protection provided by the ladder.

Here, Plaintiff's testimony is consistent; although Plaintiff's counsel suggests that the ladder fell to the floor, Plaintiff herself never made such a statement. However, defendants argue that while Plaintiff's testimony is consistent, it is nevertheless ambiguous as to how her accident happened. Thus, the present action is distinguishable from *Campos* as there is no issue here as to Plaintiff's credibility.

The Court also notes that Plaintiff was subject to an elevation-related risk covered by the statute. As to whether a statutory violation proximately caused her accident, Plaintiff testified, as

detailed above, that she “felt the ladder go,” immediately before grabbing onto the pipe. This testimony tends to show a violation of the statute, as it suggests that the locked A-frame ladder failed to provide sufficient protection from the elevation risk, as it shifted under Plaintiff’s feet as she spliced wires above the ceiling.¹

The Tribeca defendants point to testimony in which Plaintiff stated that she did not know which direction the ladder shifted as evidence that summary judgment is precluded by a material issue of fact as to how the accident happened:

- “Q: Were you in the in the process of pushing or pulling anything when the ladder moved?
A: No, I was standing on the ladder, working.
Q: Did you feel it, um, tip or slide or wobble?
A: I just felt it go from under me. There wasn’t any ... warning sign ...
Q: You felt it? It was there was there one minute and the next minute you felt it go out from under your feet?
A: That’s correct.
Q: Could you tell which direction it went? Did [it] go to your back, to your side or someplace else?
A: I’m on the ladder. It just – it just left. I don’t know if it went back or -- it just left.”

(NYSCEF doc No. 114 at 43-44).

This shows the existence of an issue of fact as to which direction the ladder moved, but this is not a material issue of fact. That is, Plaintiff’s consistent and uncontradicted testimony is that the ladder moved while she was performing work at elevation, and ceased providing her protection against that danger. This constitutes a violation of the statute. That violation of the statute proximately caused Plaintiff’s injuries, as she was injured arresting her fall (*see Messina v*

¹ The Rudin defendants and 32 Sixth’s argument that the fact Plaintiff never fell to the floor should serve as a basis for dismissing her section 240 (1) is unpersuasive, as owners and general contractors and their agents are liable under the statute as long as a violation of the statute proximately caused a plaintiff’s injuries (*see Messina v City of New York*, 148 AD3d 493 [1st Dept 2017] [awarding summary judgment under the statute and noting that “Plaintiff was not required to show that the ladder was defective or that he actually fell off the ladder to satisfy his *prima facie* burden]).

City of New York, 148 AD3d 493 [1st Dept 2017]). As the First Department has held in *Messina* and elsewhere, Plaintiff need not show that a ladder was defective to show that it provided insufficient protection against gravity-related risk.

As Plaintiff made an un rebutted showing that a violation of section 240 (1) proximately caused her injuries, she is entitled to partial summary judgment as to liability against owners, general contractors and their agents. Here, Plaintiff has not fleshed out an agency argument against any of the defendants. Thus, she is only entitled to summary judgment on this issue against 32 Sixth, the owner of the premises, and Theodore Williams Construction, the general contractor. As a corollary of Plaintiff's entitlement to judgment as to liability under this statute, the branch of Rudin and 32 Sixth's motion seeking dismissal of Plaintiff's claims under this statute must be denied.

IV. Rudin Management and 32 Sixth's Application for Indemnification

Rudin Management and 32 Sixth apply for contractual indemnification against Theodore Williams Construction Company, LLC (Theodore Williams Construction) and Tribeca Film Festival, LLC (Tribeca). "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593 [1st Dept 2014] [internal citation omitted]).

As to Theodore Williams Construction, it entered into an indemnification/insurance agreement with Rudin which states that Theodore Williams Construction agreed to:

"defend, protect, indemnify and hold harmless [32 Sixth], Rudin ... from and against each and every claim, demand, or cause of action [against them] ... and all liability, judgment, cost, expense (including, but not limited to, reasonable attorneys fees ...) to the caused by, arising out of, or in any way incidental to or in connection with (i) the performance ... of any or all work performed by, or

on behalf of, Contractor's parties, and/or (ii) any and all fraudulent, wrongful, and/or negligent acts by Contractor's parties."

(NYSCEF doc No. 122).

Here, the subject work was clearly covered by this provision, as it arose out of the work of one of Theodore Williams' Construction's subcontractors work, which is clearly included within "Contractor's parties." Accordingly, Rudin Management and 32 Sixth are entitled to summary judgment on their contractual indemnification claims against Theodore Williams Construction.

As to Tribeca, the lease agreement between it and 32 Sixth provides that Tribeca will indemnify 32 Sixth and Rudin Management for liabilities incurred through:

"the use or occupancy or manner of use or occupancy of the Demised Premises or by Tenant or any person claiming through or under Tenant, or (iv) any acts, omissions or negligence of Tenant or any such person, or the contractors, agents, servants, employees ... including, but not limited to, any acts omissions or negligence in the making or performing of any Alterations" (NYSCEF doc No. 120, § 19.02).

This indemnification provision is also triggered, as the liability here arose from the acts and omissions Tribeca's contractors. Accordingly, 32 Sixth and Rudin Management are entitled to summary judgment on their contractual indemnification claims against Tribeca.

V. Cross Claims Against the Rudin defendant and 32 Sixth

The Rudin defendants and 32 Sixth are entitled to dismissal of all cross claims for contribution and common-law negligence, as the Court has determined that these parties were not negligent in Plaintiff's accident (*see above*, § I).

VI. Amended Answer

The Rudin defendants and 32 Sixth submit a proposed amended answer (NYSCEF doc No. 125). No party objects to this branch of motion seq. No. 005. Accordingly, the Rudin defendants and 32 Sixth's application for an order interposing an amended an answer and deeming service upon all parties on the date of this decision is granted.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff's motion for partial summary judgment is granted to the extent that Plaintiff is entitled to partial summary judgment against defendants Theodore Williams Construction Company, LLC and 32 Sixth Avenue Company LLC (32 Sixth) as to liability pursuant to Labor Law § 240 (1); and it is further

ORDERED that the motion of 32 Sixth and defendants Rudin Management Co. (Rudin Management), Inc., Rudin 32 AA Associates, LLC (together, the Rudin defendants) is resolved as follows:

- The branch seeking dismissal of Plaintiff's Labor Law § 240 (1) claim is denied;
- The branch seeking dismissal of Plaintiff's Labor Law § 241 (6) claim is denied;
- The branch seeking dismissal of Plaintiff's Labor Law § 200 claim is granted;
- The branch seeking summary judgment on 32 Sixth and Rudin Management's contractual indemnification claims against defendants Theodore Williams Construction and Tribeca Film Festival, LLC is granted;
- The branch seeking to interpose an amended answer (NYSCEF doc No. 125) is granted, and the service is deemed on all parties as of the date of this decision.

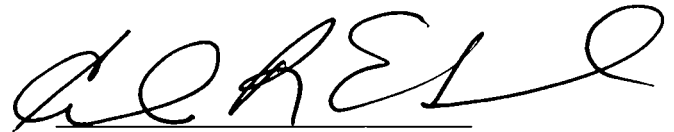
And it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly, and the remaining claims are severed and continue; and it is further

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

Dated: October 18, 2019

ENTER:



Hon. CAROL R. EDMED, JSC

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