

**Gulinazzo v Seventh Regiment Armory
Conservancy, Inc.**

2019 NY Slip Op 33405(U)

November 18, 2019

Supreme Court, New York County

Docket Number: 157975/2014

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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GULINAZZO, SALVATORE

Plaintiff,

- v -

SEVENTH REGIMENT ARMORY CONSERVANCY, INC.;
ROBERT B. SAMUELS, INC.

Defendants.

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INDEX NO. 157975/2014
MOTION DATE 10/29/2018
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93 were read on this motion to/for SUMMARY JUDGMENT

In this Labor Law matter, defendant Seventh Regiment Armory Conservancy, Inc. ("Seventh Regiment") moves for summary judgment pursuant to CPLR 3212 on the following: (1) to dismiss all causes of action asserted by plaintiff Salvatore Gulinazzo against Seventh Regiment; (2) for judgment on Seventh Regiment's cross-claims against co-defendant Robert B. Samuels, Inc. ("RBS") for contractual and common-law indemnification, including all attorneys' fees incurred to date; and (3) to dismiss all cross-claims asserted against Seventh Regiment (NYSCEF #61 - Notice of Motion). Plaintiff and RBS oppose the motion. The Decision and Order is as follows:

FACTS

Plaintiff's jobsite accident took place on September 25, 2013, at 643 Park Avenue (also known as the Seventh Regiment Armory) in the city, county, and state of New York. Defendant Seventh Regiment leases the premises from the State of New York. At the time of the accident, the building was undergoing renovation. Plaintiff was employed by non-party construction manager Tishman Construction Corp. ("Tishman"). RBS was retained by Tishman to perform electrical work at the Seventh Regiment Armory.

Plaintiff's accident occurred at approximately 7:30 AM. Plaintiff was instructed by his foreman, Giovanni Castellano, to go to the fifth floor of the building to make sure everything was in order. While plaintiff did this, Castellano and a co-worker, Roberto DeAlmeida, began to move containers filled with concrete debris from the fifth floor to the basement (NYSCEF #73 - Gulinazzo EBT at 37-

40). The containers were made of metal, had four wheels, and were approximately two feet wide, three feet long, and four to five feet high (NYSCEF #81 – DeAlmeida EBT at 21-22). Following plaintiff's initial job to ensure that everything was in order, he assisted Castellano and DeAlmeida in moving the containers.

The only means of transporting the containers to the basement at that time was by an elevator, which was used by both the construction workers and by residents of a women's shelter located at the premises (NYSCEF #73 at 43-44). Plaintiff moved a container to the area where the elevator was located on the fifth floor (*id.* at 59). The container weighed approximately 300 to 400 pounds (*id.* at 61). Plaintiff claims that when the elevator arrived, a resident of the shelter was on the elevator and that her presence interfered with plaintiff's and DeAlmeida's attempt to load the container onto the elevator (*id.* at 61).

Plaintiff testified that after he and DeAlmeida struggled with the container, Castellano attempted to help them, but he too gave up and began pushing the container out of the elevator. Plaintiff was positioned on the outside of the elevator pulling the container out of the elevator. As the container came out of the elevator, he was struck by an oncoming man-lift (*id.* at 62-68).

Plaintiff testified that he checked behind him before he began to maneuver the container and nothing was there, however, about 30-45 seconds later the man-lift was behind him and the accident occurred (NYSCEF #73 at 73-74). Plaintiff testified that he did not hear an audible beep from the man-lift or any sound from the man-lift at all (*id.* at 74). DeAlmeida testified that he could not recall hearing a beeping sound from the manlift (NYSCEF #81 at 52). Plaintiff also testified that it was "quite dim" and "poorly lit" near the elevator (*id.* at 48-49, 69-70).

On the other hand, RBS electrician Frank Brancato testified that he was on the man-lift installing or wiring the air-conditioner unit and that the man-lift was not moving at the time of plaintiff's accident (NYSCEF #75 – Brancato EBT at 39-40; 43). Brancato testified that the man-lift had been in place since 7:00 AM on the morning of the accident and was not moved after that point, and there were cones around the man-lift (*id.* at 39, 42-43). Brancato testified that Castellano pushed the container "with no warning" and the "momentum of him pushing it pushed the [container] into [plaintiff] who was then sandwiched between the [container]" and the man-lift (*id.* at 49-52).

Plaintiff testified that he had no interactions with Seventh Regiment and was not provided any tools or materials by them (NYSCEF #73 at 32). Plaintiff added that he only took instructions from his Tishman foreman and superintendent (*id.*).

RBS's contract with Tishman included an indemnification clause applicable to the Seventh Regiment-RBS relationship that reads:

To the fullest extent permitted by law, the Contractor [RBS] shall indemnify, defend and hold harmless the Owner, Construction Manager... from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal costs and expenses (collectively "Claims"), arising out of or resulting from the acts or omissions of Contractor, or anyone else for whose acts Contractor may be liable, in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations, including the performance of the obligations set forth in this clause. Contractor's duty to indemnify the Indemnitees shall arise except to the extent that any such claim, damages, loss or expense was caused by the proven negligence of the Indemnitees or an Indemnitee, as finally determined by a court of competent jurisdiction. (NYSCEF #83 – RBS-Tishman Contract at ¶7).

DISCUSSION

As a preliminary matter, plaintiff does not oppose summary judgment on his Labor Law § 240 claim, his common law negligence claim, and his Labor Law § 241(6) claims except for the claim predicated on Industrial Code § 23-9.8(l). As such, those claims are deemed abandoned and dismissed as against Seventh Regiment. What remains is plaintiff's opposition to Seventh Regiment's summary judgment motion on his Labor Law § 200 claim and his Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code § 23-9.8(l).

Summary Judgment Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Labor Law §241(6) – Industrial Code § 23-9.8(l) Claim

Labor Law § 241(6) creates a non-delegable duty on owners and contractors mandating compliance with the Industrial Code (IC) of the State of New York (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). Liability under the statute is established by showing that there was a violation of a provision of the Industrial Code which provides a specific, positive command (*see Rizzo v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 349 [1998]). Industrial Code § 23-9.8(l) is such an affirmative command (*see Scott v American Museum of Natural History*, 3 AD3d 442, 443 [1st Dept 2004] [recognizing 23-9.8(l) to be sufficient basis for claim under Labor Law §241(6) but dismissing claim because of evidence that forklift was equipped with audible backup warning device]).

Plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-9.8(l) reads as follows: "Warning devices. Every power-operated fork lift truck shall be equipped with a horn, whistle, gong or similar warning device which can be actuated by the operator. Such device shall be clearly audible above the normal noise level in the work area" (12 NYCRR 23-9.8(l)). Industrial Code § 23-9.8(l) consists of two parts: (1) that a fork lift is equipped with an audible warning device; and (2) that the device is clearly audible above normal noise in a work area. While Seventh Regiment makes a prima facie showing that it is entitled to summary judgment, plaintiff successfully rebuts and raises a question of fact regarding whether the device was clearly audible. Thus, Seventh Regiment's motion for summary judgment on this Labor Law § 346(1) claim cannot be sustained.

Seventh Regiment has proffered evidence that the man-lift was equipped with an audible warning device and that it could be heard at a work site. Seventh Regiment points to the testimony of non-party witness Carl Alacqua, Tishman's superintendent on the project. Alacqua testified that all man-lifts at the Seventh Regiment project, including the man-lift in question here, were equipped with audible signals that operated when the man-lifts moved forward or backwards (NYSCEF #79 – Alacqua EBT at 69). Alacqua also testified that he believed that the man-lift also had flashing lights on it (*id.* at 73). Additionally, non-party witness Zef Dedvukaj, Tishman's senior superintendent on the Seventh Regiment project, testified that the audible noise could be heard within 10 feet of the man-lift (NYSCEF #78 at 152). As such, Seventh Regiment has made a prima facie showing of entitlement to summary judgment on plaintiff's Industrial Code § 23-9.8(l) claim.

While plaintiff does not rebut Seventh Regiment's showing that the man-lift was equipped with an audible warning device, plaintiff does submit evidence raising a question of material fact with regard to the loudness of the warning device. Plaintiff and DeAlmedia testified that they did not hear or did not recall hearing a warning beep. In his testimony, DeAlmeida did not state that man-lift did not have an audible signal – he merely testified that he did not recall hearing any audible

signal (NYSCEF #81 at 52-53). Plaintiff's testimony was that he did not hear anything before the impact (NYSCEF #68 at 74). Thus, plaintiff raises a question of material fact, and that is whether the audible device sufficiently loud as required by Industrial Code § 23-9.8(l).

There is also a critical dispute regarding the accident itself: was the man-lift moving or stationary at the time of the accident? Plaintiff and DeAlmeida testified that the man-lift was moving at the time of the accident. Brancato testified that the man-lift was stationary. If the man-lift was moving and the audible warning system was too quiet, Seventh Regiment may be liable under Labor Law § 241(6) and Industrial Code § 23-9.8(l). If the man-lift was stationary, the audible warning system would not be in operation, and Seventh Regiment would not be liable. However, with the facts viewed most favorably for plaintiff, there remains multiple questions of fact that preclude summary judgment in favor of Seventh Regiment at this time.

Labor Law § 200 Claim

Labor Law § 200 “codified landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer-Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). Labor Law § 200(1) states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.” (Labor Law § 200(1)).

There are two distinct standards applicable to Labor Law § 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

“Where a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically,

“liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis “requires actual supervisory control or input into how the work is performed”]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 “when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]; *see also Jaycox v VNO Bruckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]).

Here, plaintiff’s allegations indicate that the accident was caused by the means and methods of construction, namely, the workers strategy in maneuvering the metal containers in and out of the elevator, and the placement of the man-lift.

This branch of Seventh Regiment’s motion for summary judgment is granted. Seventh Regiment did not exercise control or supervision over the worksite. Here, plaintiff merely alleges that Seventh Regiment maintained a “coordination” role regarding control over the building’s elevator.

The “coordination” described by Seventh Regiment’s project manager Wayne Lowery indicated that Seventh Regiment had the authority and responsibility to coordinate the use of the elevator among contractors and residents (NYSCEF #74 – Lowery EBT at 21). Responsibilities that revolve around “coordination” of subcontractors do not rise to the level of supervisory control necessary to impose Labor Law § 200 liability in a means and methods case (*see Bisram v Long Island Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [“Plaintiff established that the general contractor may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety, but those responsibilities do not rise to the level of supervision or control necessary to hold the general contractor liable for plaintiff’s injuries under Labor Law § 200”]). As such, Labor Law § 200 liability cannot be imposed on Seventh Regiment and the claim against it must be dismissed.

In any event, even if Labor Law § 200 liability could be imposed in such a coordination situation, the causal connection between plaintiff’s injury and Seventh Regiment’s elevator control is attenuated at best. The alleged lack of coordination that allowed a shelter resident onto the elevator is not the cause of plaintiff’s injury. The shelter resident’s presence on the elevator is still several steps removed from plaintiff’s injury. First, the plaintiff and his co-workers attempted to move the containers onto the elevator while the resident was present, instead of simply

waiting for the elevator to come around again. Second, the plaintiff's co-worker became exasperated with the inability to load the container and then pushed the container out of the elevator in such a manner that plaintiff was pushed back quickly. Third, the push had to be of enough force that plaintiff collided with the man-lift. These steps were all required for plaintiff's accident to occur. Seventh Regiment's control (or lack thereof) over the elevator was not the cause of plaintiff's accident. Plaintiff's Labor Law § 200 claim against Seventh Regiment is dismissed.

RBS's Cross-Claims Against Seventh Regiment

The next branch of Seventh Regiment's motion for summary judgment regards RBS's cross-claims against it, which are: (1) common law indemnification; (2) contribution; (3) contractual indemnification; and (4) breach of contractual obligation to procure liability insurance (NYSCEF #6 – RBS Verified Answer at ¶¶26-29). However, co-defendant RBS opposes Seventh Regiment's summary judgment motion with regards to only its cross-claim for contribution (NYSCEF #90 – RBS Opposition at ¶¶29-31). As such, RBS's cross-claims for common law indemnification, contractual indemnification, and breach of contract are dismissed as abandoned.

As to the contribution cross-claim, Seventh Regiment's motion is denied. As the Labor Law §241(6) claim is still active, Seventh Regiment might still be found liable in this action for plaintiff's injury and thus may be liable to RBS for contribution.

Seventh Regiment's Cross-Claims Against RBS

Seventh Regiment seeks summary judgment on its cross-claims against RBS for contractual and common-law indemnification, and contribution (NYSCEF #7 – Seventh Regiment Answer at ¶¶10-11). This branch of Seventh Regiment's motion is denied as premature.

It remains a question of fact whether RBS was negligent or even acted at all in this matter. There is a dispute as to how plaintiff's accident occurred. Plaintiff's version speaks to a moving man-lift; Brancato's version claims that the man-lift was stationary and that cones were placed around the man-lift. It thus remains a question of fact whether RBS's acts caused plaintiff's injury.

Thus, deciding the contractual indemnification cross-claim is premature at this stage. The RBS contract states that RBS must indemnify Seventh Regiment if a claim "aris[es] out of or result[s] from the acts or omissions of [RBS], or anyone else for whose acts [RBS] may be liable... [RBS's] duty to indemnify [Seventh Regiment] shall arise except that any such claim... was caused by the proven negligence of [Seventh Regiment]" (NYSCEF #83 at ¶7). If a jury was to find that

plaintiff's injury did not result from any of RBS's conduct, RBS would not be required to indemnify Seventh Regiment.

Likewise, it is premature to determine if common-law indemnification applies here. "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). As RBS' liability remains a question of fact, it is premature to determine whether RBS is liable to Seventh Regiment for common law indemnification. This also means that it is premature to determine if Seventh Regiment is entitled to contribution from RBS. Accordingly, the branch of Seventh Regiment's motion for summary judgment regarding its cross-claims against RBS must be denied at this time.

Accordingly, it is ORDERED that the branch of Seventh Regiment's motion for summary judgment regarding plaintiff Salvatore Gulinazzo's claim under Labor Law, § 241(6) and Industrial Code § 23-9.8(l) is denied; it is further


ORDERED that the branches of Seventh Regiment's motion for summary judgment regarding plaintiff's common law negligence claim, Labor Law § 200 claim, Labor Law § 240 claim, and all other Labor Law § 241(6) claims are granted, and the claims dismissed; it is further

ORDERED that the branch of Seventh Regiment's motion for summary judgment regarding co-defendant's RBS's cross-claims against it is granted with respect to RBS's claims for common law and contractual indemnification, and breach of contract; it is denied with respect to RBS's cross-claim for contribution; it is further

ORDERED that the branch of Seventh Regiment's motion for summary judgment regarding its cross-claims against RBS is denied as premature; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

11/18/2019
DATE

MARGARETA. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE