Scott v Rising Dev. Yonkers, Inc.
2019 NY Slip Op 34314(U)
January 9, 2019
Supreme Court, Westchester County
Docket Number: Index No. 56208/16
Judge: David F. Everett
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To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X
KIRA D. SCOTT,

Plaintiff,

-against-

RISING DEVELOPMENT YONKERS, INC and RISING DEVELOPMENT YONKERS-MILL/MAIN LLC, J&BB CONSTRUCTION CORP., and ADELINA NUNEZ, d/b/a J&BB CONSTRUCTION CORP.,

Defendants,
----------X
RISING DEVELOPMENT YONKERS, INC and RISING DEVERLOPMENT YONKERS-MILL/MAIN LLC, J&BB CONSTRUCTION CORP., and ADELINA NUNEZ, d/b/a J&BB CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

OFFICIAL CONTRACTING, LLC and ECONOMY IRON WORK & STEEL DESIGN CORP.,

Third-Party Defendants.
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Index No. 56208/16
Mot. Seq. Nos. 001, 002
Decision and Order

EVERETT, J.

The following papers were read on the motions:
Notice of Motion/Affirmation in Supp/Exhibits A-E (docs 47-53)
Affirmation in Opp (doc 71)
Affirmation in Opp/Exhibits A-C (docs 75-78)
Notice of Motion/Affirmation in Supp/Exhibits A-J (docs 66)
Reply Affirmation (docs 79, 86)
Reply Affirmation/Exhibit E (docs 82-83)

In this action sounding in labor law, plaintiff Kira D. Scott (Scott) moves, under motion sequence 001, for an order, pursuant to CPLR 3212, granting partial summary judgment as to

liability on her Labor Law § 240 (1) claim, and setting the matter down for a damages trial. Under motion sequence number 002, defendants/third party plaintiffs Rising Development Yonkers, Inc, Rising Development Yonkers-Mill/Main, LLC (Rising LLC), JB&B Construction Corp (JB&B) (herein sued as J&BB), and Adelina Nunez (Nunez) d/b/a J&BB Construction Corp jointly move for orders, pursuant to CPLR 3212, granting partial summary judgment: (1) dismissing Scott's Labor Law § 240 (1) claim; and (2) granting contractual indemnification in its favor and against third-party defendant Official Contracting, LLC (Official), and directing Official to immediately assume its defense and indemnification. The motions, under motion sequence numbers 001 and 002, are consolidated for disposition. Upon the foregoing papers, plaintiff's motion is granted, and the joint motion of defendants Rising LLC, JB&B and Nunez is denied.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on May 3, 2016, to recover damages for injuries she allegedly sustained when she was struck by an unsecured falling object, that being a metal I-beam, now identified as a 100 lb., five foot long steel beam, while working at a construction site at 27 Main Street and 4 Mill Street,[1] Yonkers, New York, on June 26; 2015. Scott, who was employed by third-party defendant Official at the time of her accident, named Rising LLC as a defendant based on its ownership of the construction site, J&BB as a defendant based on its role as general

[1] The Joint Defendants provide an alternate address of 27 Main Street and 2 Mill Street, Yonkers, New York.

contractor at the construction site, and Nunez as a defendant based on her ownership of J&BB. It is claimed that the incident occurred during the demolition phase of an ongoing rehabilitation project at the Yonkers' site (Project), and that Scott was part of a clean up crew directed by Official's foreman, non party Ramadhan, to dig out and remove thousands of bricks from inside the pit of an elevator shaft and place them into a dumpster. The complaint, as amplified by the bill of particulars, charges defendants with violating Labor Law §§ 200, 240 (1), and 241 (6), and with violations of New York's Industrial Code Rule 23, and OSHA, based on their respective failures to properly protect her from the risk to which she was exposed, that being an unsecured falling object.

Issue was joined by service of Rising LLC, Nunez and J&BB's joint answer with affirmative defenses on or about June 18, 2016. By third-party summons and complaint filed on September 15, 2016, Rising LLC, Nunez and J&BB (Joint Defendants) impleaded Official, the subcontractor handling much of the demolition, and Economy Iron Work & Steel Design Corp (Economy Iron), the ironwork subcontractor responsible for the cutting and welding of iron/steel at the site during both the demolition and reconstruction phases of the Project. As relevant here, the Joint Defendants claim that Official is contractually liable to them for a defense, insurance, indemnification and contribution for its proportionate share of any judgment or settlement Scott may recover due to the negligence, carelessness and/or recklessness of Official (first, third and fifth causes of action). By verified answer dated July 18, 2016, Official responded to the third-party complaint, providing general denials to the allegations, 13 affirmative defenses, a cross claim against Economy and a counterclaim against the Joint Defendants for common law and/or contractual indemnification and contribution. After Rising LLC responded to the counterclaim,

the parties conducted discovery pursuant to the preliminary conference order and follow-up compliance conference orders and Scott filed a note of issue and certificate of readiness on July 3, 2018.

The underlying and largely undisputed facts are that, by written contract executed in or about September 2014, Rising LLC hired JB&B to be its general contractor on the Project. The work involved demolition and new construction, and the hiring of subcontractors to perform various aspects of the work. By written subcontract agreement dated October 23, 2014 (Subcontract), JB&B hired Official to perform demolition and aspects of the construction, which included taking apart an old elevator shaft. On the date, and at the time, of the incident, Scott was working in the pit of the elevator shaft at the direction of Ramadhan. At her deposition, Scott explained that, before she and her co-workers went into the elevator pit to separate the multitude of bricks that had fallen into the elevator shaft during demolition, a wood platform, or "plank," was constructed above their heads to protect them from any falling dirt, rocks or other materials (Scott tr at 44). When asked about the incident itself, Scott testified that a heavy metal beam broke through the wood platform and struck her. More specifically, Scott testified: "[t]he metal beam that they were cutting that they weren't supposed to be cutting over our heads from the seventh floor fell down into the elevator pit and banged into my arm and into my hip" (*id.* at 45). When asked about what safety equipment she was given, Scott stated that she wore construction worker shoes, and was provided with safety gloves, goggles and a helmet (*id.* at 29, 82). Scott claims that the falling beam caused injuries to her neck, shoulder, arm, elbow, hip and lower back.

Currently before the Court are the parties' respective dispositive motions for summary judgment.

It is well settled that:

> "[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. . . . [A party] opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]).

As to Scott's Labor Law § 240 (1) cause of action, the statute provides, in relevant part:

> [a]ll 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.

In accordance with New York caselaw, liability maybe imposed against an owner or contractor, under Labor Law § 240 (1), where the "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal quotation Marks and citations omitted]). The Court of Appeals has made it clear that the statute is meant to be liberally construed to accomplish its intended purpose, and that absolute liability is

"contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Scott contends that what happened at the Project is precisely what the statute was enacted to prevent, since the proximate cause of her accident and injuries was a failure to secure the steel beam so as to prevent it from falling and causing "harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 1993]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]). Scott supports her motion with, among other things, copies of the pleadings, the party deposition transcripts, and the Subcontract.

By this evidence, Scott demonstrates prima facie entitlement to judgment on her Labor Law § 240 (1) cause of action, shifting the burden to the Joint Defendants to submit admissible evidence sufficient to require a trial of material questions of fact on which they rest their defense (*Zuckerman v City of New York*, 49 NY2d at 562).

Here, the Joint Defendants do not deny their respective roles as owner and general contractor within the meaning of Labor Law § 240 (1). Rather, what they argue is that Scott's motion must be denied, because there is a question of fact as to whether the steel beam was in the midst of being "hoisted" or "secured" when it fell, since a falling object at a construction site must either be in the process of being "hosted" or "secured" for there to be a Labor Law § 240 (1) violation. However, the Joint Defendants' emphasis on the words "hoisted" and "secured" to avoid liability is unavailing, as it was the alleged failure to properly secure the

subject beam that underlies Scott's claim. When questioned about how the steel contractor was supposed to cut and remove the steel beam during demolition, Nunez stated the following:

> "[t]he method to cut a piece of steel that is called rail, that was attached to the wall. It was that you tied up the piece of steel with a chain and you cut a section, let's say a 4-feet section, that's how it goes. And that's how all the pieces were cut, slowly by pieces to avoid any big fall. The piece was not supposed to fall, it's supposed to be laid down in the plywood, but that things happened, the chains looks like it got lose [sic], something to that matter and it slide, it touched the plywood, through the hole, I don't remember a small hole and it kept going down to the pit. That's what happened"

(Nunez tr at 45). The Joint Defendants' assertions notwithstanding, the steel beam fell as a result of a failure to properly secure it with a chain or otherwise, while it was in the process of being removed during the demolition phase of the Project. The steel beam was, in fact, an object that required securing for the proposes of the task at hand, and was not a random item that fell, such as the water jug that rolled off of a pitched roof in *Banscher v Actus Lend Lease, LLC* (103 AD3d 823 [2d Dept 2013]), a case cited by the Joint Defendants in support of their opposition to Scott's motion and in support of their own motion for summary judgment.

An examination of their notice of motion for summary judgment, and affirmation in support reveals the Joint Defendants' formal request: for a summary dismissal of Scott's Labor Law § 240 (1) cause of action; for an order granting contractual indemnification against Official; and for an order directing Official to immediately assume their defense and indemnification, with reimbursement for all costs, expenses and attorney's fees incurred to date. Therefore, to the extent the Joint Defendants request any additional relief via their supporting papers (dismissal of Scott's Labor Law §§ 200 and 241 [6] causes of action), the requests are not properly before the Court for consideration and resolution.

Having determined that Scott is entitled to summary judgment on her Labor Law § 240 (1) cause of action, what remains is that aspect of the Joint Defendants' motion that seeks a defense, indemnification, and reimbursement of costs, expenses and attorney's fees incurred to date. In support of their motion, the Joint Defendants point to provisions in the Subcontract which require Official to obtain general liability insurance and owners' compensation insurance, and to provide JB&B with certificates of insurance naming it as certificate holder, and both Rising LLC and JB&B as additional insureds. They also point to provisions in the Subcontract which support their claim for a defense, indemnification, and reimbursement of the above-mentioned costs, expenses and attorney's fees. For the following reasons, this aspect of the Joint Defendants' motion must is also denied.

Under New York law, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 661-662 [2009]; *see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]; General Obligations Law § 5-322.1). Given the manner in which the accident occurred, in order for Joint Defendants to demonstrate that they were not in any way negligent, they would have to show that they lacked control over the demolition, or notice of the allegedly dangerous condition that lead to plaintiff's accident (*see Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1100 [2d Dept 2009]).

A review of Nunez's testimony confirms that both she, on behalf of JB&B, and Ramadhan, on behalf of Official, were handling safety coordination on site (Nunez tr at 17). Nunez testified that either she, or her project manager, Hirina Apolina (Apolina), were on site on

a daily basis (*id.* at 27), that they exercised their authority to supervise and direct the work being performed (*id.* at 28-29). Nunez testified that JB&B also had an assistant project manager, Nelson Grullon (Grullon), who came to the site about once a week (*id.* at 30, 34), and when asked whether she, Apolina and Grullon had the ability to stop any work that was deemed to be unsafe, Nunez answered "immediately" (*id.* at 34).

At Official's deposition, Ramadhan testified, in pertinent part, that he was present at the site at the time of the incident, and that it was his workers who prepped the subject elevator shaft for demolition, getting it ready for the steel company to come in and extract the old elevator tracks (Ramadhan tr at 28-30). He testified that Official's work included installing the wood platforms in the elevator shaft (*id.*). Ramadhan also testified that the iron and steel workers were cutting the steel tracks, and that the piece of cut steel that fell through the platform and struck Scott was between three and four feet long, and weighed approximately 20 lbs. (*id.* 48, 49). When asked how the iron workers were supposed to dispose of the cut iron "debris," Ramadhan replied: "[t]hey would tie a rope on it to hold it up and if they would - - they tied a rope on it to hold it, cut it and it would hang and then you cut the other side and you would swing it over on the floor," not the platform, after which the debris would be carried down manually (*id.* at 51, 52).

The Joint Defendants also reference specific provisions in the Subcontract which require Official, as subcontractor, to ensure that all of the work was performed safely and in accordance with the latest safety standards (Subcontract, Scope of Work, §§ 5, 6, 16). They refer to the specific provision which required Official to indemnify, hold harmless and defend them:

"against claims, liability, damages, losses and expenses, including . . . attorneys'

> fees arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage loss or expenses in any manner attributable to bodily injury . . . but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor . . . or by the negligent acts or omissions . . . of the Subcontractor's Subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not such claim, damage loss or expense is caused in part by a party indemnified hereunder. . . . Subcontractor and/or Sub-Subcontractor will indemnify and hold harmless the parties referenced above (the indemnitees) to the fullest extent permitted by applicable law in the event of a loss (including but not limited to, any claim, 'suit', cost or expense arising out of such loss), suffered by an employee of the Subcontractor or Sub-Subcontractor, regardless of whether or not such loss is caused in part by a party indemnified hereunder"

(Subcontract, Indemnification and Defense § 4.6).

Under the clear terms of the Subcontract, the Joint Defendants would be entitled to both indemnification and a defense from Official should it be established that they were not negligent in any manner with respect to the alleged events of June 26, 2015. However, where as here, there is evidence that JB&B maintained someone at the Project site on a daily basis, who had the authority to supervise and direct the work, and to stop any work being done at the site should Nunez, Apolina or Grullon see the work being performed in an unsafe manner, the Court cannot find, as it must to grant the Joint Defendants' motion for summary judgment on their claim for contractual indemnification and related relief, that there are no questions of fact as to their own negligence by omission or co-mission (see *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d at 661-662; *Tarpey v Kolanu Partners, LLC*, 68 AD3d at 1100).

Accordingly, it is

ORDERED that plaintiff's motion, under motion sequence number 001, for partial summary judgment as to liability on her cause of action pursuant to Labor Law 240 (1) is granted

and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the motion of defendants, under motion sequence number 002, is denied; and it is further

ORDERED that the remaining causes of action shall continue; and it is further

ORDERED that counsel for all parties are directed to appear in the Settlement Conference Part in courtroom 1600, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Drive, White Plains, New York on Tuesday, February 5, 2019, at 9:15 a.m. to schedule a date for trial.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
January 9, 2019

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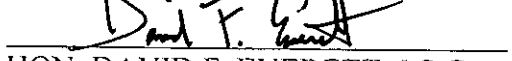

HON. DAVID F. EVERETT, J.S.C.

Filed Electronically

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