Supreme Court of the State of New York
County of Kings

Part 91

Index Number 513780/2016
SEQ #008 & 009

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3, 4, 5
Replying Affidavits	6
Exhibits	
Other	

DEIVY LEON RODRIGUEZ,

Plaintiff,

against

WATERFRONT PLAZA LLC AND ZNKO CONSTRUCTION INC.,

Defendants.

ZNKO CONSTRUCTION INC.,

Third-Party Plaintiff,

against

RIVERSIDE DESIGN, INC.,

Third-Party Defendant.

WATERFRONT PLAZA LLC.,

Second Third-Party Plaintiff,

against

RIVERSIDE DESIGN, INC. AND JARA SERVICES LLC,

Second Third-Party Defendant.

Defendant and second third-party plaintiff Waterfront Plaza LLC's motion for summary judgment against defendant ZNKO Construction ("ZNKO") and second third-party defendant Riverside Design ("Riverside") and plaintiff's motion for summary judgment on his Labor Law 240(1) claim only are decided as follows:

Factual Background

Plaintiff is an employee of third-party defendant Jara Services ("Jara"), who was hired as a subcontractor on a construction project on property owned by Waterfront. ZNKO served as general contractor for the construction. On May 25, 2016, while performing his job, plaintiff was injured when he fell through a hole in the floor and a beam fell on top of him. He asserts claims for negligence and violation of Labor Law §§ 200, 240(1) and 241(6). Waterfront and ZNKO each assert cross-claims against the other for negligence, indemnification, and contribution. ZNKO asserts claims for indemnification, contribution and breach of contract against Riverside, another subcontractor on the project. Waterfront asserts claims for indemnification, contribution and breach of contract against Riverside and Jara.

Plaintiff testified at deposition that, on the day of the accident, he was tasked with raising metal beams to the third floor of the building of the construction site. The beams were approximately 20 feet long and 12 inches in width. Plaintiff and his coworker lifted each beam manually and would walk with the beam to a certain point, at which time they turned the beam so it pointed up vertically. Then, they placed the beam on the second floor, which was open. One of them then walked to the second floor, tied a rope around the beam and threw the rope to the third floor, which was also open, and the worker walked to the third floor to pull the beam up to the third floor.

At one point, while plaintiff was attempting to move the beam to the vertical position, he fell through a hole in the first floor that was open to the basement/cellar 15 feet below. Plaintiff caught himself before falling completely through the hole, but the beam then fell on plaintiff. Plaintiff explained that there was no protection around or over the exposed hole and he was not

provided a harness. Plaintiff was also not provided a hoist for the beam.

Mordechai Hecht, an employee of Halcyon Management Group, which owns Waterfront, testified at his deposition that there was a fence around the hole that was open to the basement. The fence was made of wood and orange netting and was nailed to the concrete by nails. Hecht testified that he saw that the fence was in place around the hole after the accident. He also testified that, prior to the accident, the opening was covered.

Joel Breuer, an employee of ZNKO, testified at his deposition that he was aware of the hoisting process and never considered any other hoisting process for the beams. Mr. Breuer testified that there was an opening in the concrete of the first floor, that was 4 feet by 4 feet square that exposed the basement/cellar floor 15 feet below the first floor.

Plaintiff submits the affidavit of Anthony Dolhon, P.E., who opines that plaintiff should have been provided with hoists, slings, pulleys, and ropes to perform his work. Mr. Dolhon also explains how defendants should have provided plaintiff with a hoist, or other mechanism to safely secure the beam and hoist it to the third floor. Had defendants done so, Mr. Dolhon states that the beam could have been moved safely from one floor to another.

Analysis

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

A. Plaintiff's Labor Law § 240(1) Claim

Plaintiff moves for summary judgment on his Labor Law § 240(1) claim only. "Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). To prevail on this claim, plaintiff must prove defendants violated the statute and that the violation proximately caused the accident (*id.* at 731).

The statute is not violated merely because the accident involved the effect of gravity (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]). Liability under Labor Law § 240(1) depends on whether the injured worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). Likewise, the statute applies to accidents caused by falling objects, but only when the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014]).

In this case, plaintiff was working on a floor that was exposed to the floor below because of a hole. In such a situation plaintiff should have had safety equipment sufficient to prevent him from falling, and the failure to do so violated Labor Law § 240(1) (*Munzon v Victor at Fifth, LLC*, 161 AD3d 1183, 1185 [2d Dept 2018]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2d Dept 2012]). Likewise, plaintiff was in the process of manually hoisting a beam when he fell. As Mr. Dolhon explains, because the plaintiff did not have proper equipment to hoist the beam safely, the beam fell on him, a second violation of Labor Law § 240(1) (*Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707 [2d Dept 2019]; *Gikas v 42-51 Hunter St., LLC*, 134 AD3d 987,

988 [2d Dept 2015]).

Defendants argue that they did not violate Labor Law § 240(1) because the fencing around the hole was an adequate safety device. However, defendants do not provide any testimony from an expert in the field on this issue. Accordingly, defendants have not rebutted the showing made by Mr. Dolhon.

Defendants also argue that plaintiff proximately caused the accident by walking backwards into the hole even though he had seen the hole previously. Defendants seem to mistake sole proximate cause for comparative fault. As Mr. Dolhon explains, if defendants had provided plaintiff with proper hoisting devices, plaintiff would not have been required to work at an opening in the floor that was exposed to the basement or cellar below. Had defendants provided plaintiff with appropriate harnesses, he would have been protected from falling into the hole, even if he were required to work near the opening. Thus, defendants' failure to do these things, in violation of Labor Law § 240(1), is the proximate cause of the accident. Any potential comparative negligence on plaintiff's part in falling through the hole is immaterial, as comparative fault is not a defense to strict liability under Labor Law § 240(1) (*Cano v Mid-Val. Oil Co., Inc.*, 151 AD3d 685, 690 [2d Dept 2017]).

Lastly, defendants contend that this is not a "falling object" case because the beam was not in the process of being hoisted by a device. The Court of Appeals has held that, at the time of the accident, the object must be in the process of being hoisted or secured, or required securing for the purposes of the undertaking (*Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662-63 [2014]). The Court of Appeals did not hold that a device must be in use at the time. Moreover, for liability to attach, plaintiff must show that the object fell because of the absence or inadequacy

of a safety device (*Fabrizi*, 22 NY3d at 663). Plaintiff has shown that the beam was required to be hoisted and secured, and that it fell because defendants did not provide the necessary hoisting equipment. Accordingly, plaintiff's motion for summary judgment on its Labor Law § 240(1) claim is granted.

B. Contractual Indemnification

Waterfront moves for summary judgment in favor of its claims against ZNKO and Riverside for contractual defense and indemnification, and to dismiss ZNKO's cross-claims against it for contractual indemnification.

With regard to its affirmative claims, Waterfront submits two contracts. The first is an agreement between Waterfront and ZNKO, which in which ZNKO agreed to "indemnify, defend and hold harmless" Waterfront from claims arising from ZNKO's negligence, the "Work" or any breach of the agreement, or "any statutorily imposed liability for injury to employees or failure to comply with any laws or regulations affecting the Work." The contract also requires ZNKO to procure insurance. The contract does not direct Waterfront to reciprocally indemnify ZNKO.

Waterfront argues that this agreement is enforceable and that its terms require ZNKO to defend and indemnify it in this case. ZNKO states that Waterfront made its request for this relief by letter, dated March 20, 2018.[1] In letters dated May 9, 2018 and July 20, 2018, AESLIC, ZNKO's insurer, agreed to defend Waterfront if Waterfront withdrew its cross-claims and subject to a reservation of rights, "should later developed facts indicate that Waterfront's liability was not caused, in whole or in part, by ZNKO's operations or the operations of those acting on ZNKO's

[1] Waterfront also sought this relief in cross-claims contained in the answer it filed on November 11, 2016

behalf." ZNKO further explains that Waterfront responded by e-mail, dated July 23, 2018, in which it advised Waterfront would not withdraw its cross-claims. ZNKO provides copies of the letters, but not the e-mail. ZNKO argues that Waterfront rejected AESLIC's offer of defense, and therefore cannot now seek the same relief.

Waterfront does not respond directly to ZNKO's waiver argument, and does not explain why it apparently rejected AESLIC's offer to provide a defense. However, there is nothing in the contract that required Waterfront to withdraw claims or agree to AESLIC's reservation of rights before ZNKO (or its insurer AESLIC) would indemnify or defend Waterfront.

ZNKO also argues that Waterfront cannot seek total indemnification because Waterfront has not proven it was not negligent. Waterfront argues that it can seek partial indemnification, but it fails to reference any legal support from the Second Department, which has repeatedly held that a party must first prove lack of negligence to receive contractual indemnification (*Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 857 [2d Dept 2018]; *Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2d Dept 2018] [citing cases]; Gen Obl Law § 5-322.1). Accordingly, there are issues of fact that prevent summary judgment on Waterfront's claim for contractual indemnification.

The second agreement is between ZNKO and Riverside, in which Riverside agreed to indemnify Waterfront for any claims arising out of Riverside's "Work" that are caused by Riverside's negligence. Riverside has not served an answer, and so summary judgment is not appropriate (*Cremosa Food Co., LLC v Amella*, 164 AD3d 1300 [2d Dept 2018]).

Finally, Waterfront argues that ZNKO's contractual indemnification claim against it must be dismissed because no such agreement exists. ZNKO does not oppose this argument. Accordingly, the claim is dismissed.

For the foregoing reasons, plaintiff's motion for summary judgment is granted as to liability under Labor Law § 240(1). Waterfront's motion is granted to the extent that ZNKO's claim for contractual indemnification against Waterfront is dismissed.

This constitutes the decision and order of the court.

June 24, 2019
DATE

DEVIN P. COHEN
Justice of the Supreme Court