

Herrero v 2146 Nostrand Ave. Assoc., LLC.

2020 NY Slip Op 30005(U)

January 2, 2020

Supreme Court, New York County

Docket Number: 153673/2015

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

-----X

INDEX NO. 153673/2015

EDGARDO HERRERO,
Plaintiff,

MOTION DATE 01/31/2019

- v -

MOTION SEQ. NO. 004

2146 NOSTRAND AVENUE ASSOCIATES, LLC., ACHS
MANAGEMENT CORP., SHAWMUT WOODWORKING &
SUPPLY, INC., 49TH BROADWAY, LLC. D/B/A DALLAS
BBQ.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

SHAWMUT WOODWORKING & SUPPLY, INC.

Third-Party
Index No. 595519/2015

Plaintiff,

-against-

J.D. CONSULTING, LLC

Defendant.

-----X

2146 NOSTRAND AVENUE ASSOCIATES, LLC., ACHS
MANAGEMENT CORP.

Second Third-Party
Index No. 595804/2015

Plaintiff,

-against-

NOSTRAND ENTERPRISES, LLC D/B/A DALLAS BBQ,

Defendant.

-----X

SHAWMUT WOODWORKING & SUPPLY, INC.

Third Third-Party
Index No. 595391/2017

Plaintiff,

-against-

TRISON, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 165, 172, 173, 174, 175, 176, 177, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 247, 254, 255, 262, 264, 266, 267, 268, 269, 270, 274, 275, 289, 290, 291, 292, 293, 294, 295, 298, 299, 300, 305

were read on this motion to/for

JUDGMENT - SUMMARY

HON. PAUL A. GOETZ, J.:

In this action, plaintiff Edgardo A. Herrero moves for an order: 1) pursuant to CPLR 3212, for partial summary judgment for his Labor Law § 240 (1) claim against defendants, and 2) pursuant to CPLR 603 and CPLR 1010 to sever the main action from the third-party action, fourth-party action and fifth-party action. Defendant / third-party plaintiff / fifth-party plaintiff, Shawmut Woodworking & Supply Inc. d/b/a Shawmut Design & Construction (Shawmut) cross-moves for an order: 1) pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as against it, 2) dismissing any and all cross claims asserted against it, and 3) granting summary judgment in its favor for contractual indemnification claims against third-party defendant J.D. Consulting, LLC d/b/a Donaldson Traditional Interiors (JDT) and fifth-party defendant Trison, Inc. (Trison). Defendants / fourth-party plaintiffs / fourth-party defendants 2146 Nostrand Avenue Associates, LLC (Nostrand Avenue), ACHS Management Corps. (ACHS), 49th Broadway LLC d/b/a Dallas BBQ (49 Broadway), and Nostrand Enterprises, LLC d/b/a Dallas BBQ (Nostrand Enterprises) (collectively, cross moving defendants) cross-move for an order: 1) for summary judgment seeking dismissal of plaintiff's claims under Labor Law §§ 200, 240 (1), and 241 (6) and common law negligence, 2) for summary judgment granting their cross claims for contractual indemnification and breach of contract as against Shawmut and JDT, 3) for summary judgment granting their cross claims for contractual indemnification against

Trison, 4) for dismissal of all cross-claims and counter claims against them, and 5) denying plaintiff's motion in its entirety.

BACKGROUND

Plaintiff's Deposition Testimony

Plaintiff alleges that, on May 21, 2014, he was injured when he fell from a bakers scaffold. On the date of the accident, he was working as a carpenter steward for JD Traditional (JDT), a drywall company (plaintiff tr at 22-35, 56). JDT was retained to perform framing and drywalling for a project converting the premises located at 2146 Nostrand Avenue, Brooklyn, New York (the building) from a bank to a Dallas BBQ restaurant (the project) (*id.* at 25-26, 31, 357). The building has three floors and a basement (*id.* at 32). The general contractor of the project was Shawmut (*id.* at 52).

Plaintiff testified that Ed Ehmann was JDT's foreman, and that he reported to and only received instructions from Ehmann (*id.* at 34-36, 38). Ehmann held weekly toolbox safety meetings where various safety topics were discussed (*id.* at 42-44). JDT supplied its workers with the requisite equipment for the project including ladders and scaffolds (*id.* 50). JDT kept all its equipment in on one corner of the building (*id.* at 39-40). The ladders and baker scaffolds provided by JDT were kept on the first floor of the building in their gang box (*id.* at 68-69). Before the accident, on days when he needed to use a bakers scaffold, plaintiff would use the ones owned by JDT (*id.* at 78).

On the day of the accident, plaintiff arrived at the project around 5:45 a.m. (*id.* at 56). He met with Ehmann to discuss the work for the day, which included performing change orders in the basement, moving track and changing walls (*id.* at 57-58). He began working at 6:15 a.m. (*id.* at 62). He began framing metal studs in the basement and needed a ladder or bakers scaffold

to reach the 14-foot ceiling (*id.* at 62-64). Plaintiff did not go up from the basement to the first floor to get a JDT bakers scaffold and instead decided to use a bakers scaffold already in the basement (*id.* at 250). He did not know who owned the scaffold or who placed it in the basement (*id.* at 73-74). He found the scaffold down the hall in the basement and moved it to the position he needed to do his work (*id.* at 74-75). He performed an inspection prior to using it, but he did not check whether the clips were secured or whether the scaffold was engaged (*id.* at 231). He made no adjustments to the platform (*id.* at 102). He was doing work on “top track” and all he remembered was the platform gave way and he woke up on the floor (*id.* at 85). He could not remember if the platform shifted or broke; he only recalled that he fell and ended up on the floor (*id.* at 85-86).

Deposition Testimony of Michael Burke, Shawmut Superintendent

Michael Burke testified that he is a superintendent for Shawmut and was an on-site superintendent for the project (Michael Burke tr at 7-8, 10). Shawmut was the general contractor for the project (*id.* at 13,15). JDT was a subcontractor of Shawmut that began working on the project about a month before plaintiff’s accident (*id.* at 23). JDT provided their workers with the requisite equipment for the project (*id.* at 24).

Burke further testified that JDT was performing work in the basement on the date of plaintiff’s accident (*id.* at 61). He was notified by Ehmann of plaintiff’s accident (*id.* at 36, 40). He went to the basement and saw plaintiff sitting on the floor in the middle of the scaffold (*id.* at 41). He asked plaintiff if he was okay and whether he needed medical help (*id.* at 43). He then contacted 911 and asked for EMS for plaintiff (*id.* at 43). Burke testified that he did not know who owned the scaffold plaintiff had used (*id.* at 44-45) and that he did not see it (*id.* at 34-35).

He asked all of Shawmut's subcontractors about who owned the scaffold but did not receive ownership confirmation of the scaffold from any of their subcontractors (*id.* at 51).

Deposition Testimony of Katherine Douglas, Shawmut Project Manager

Katherine Douglas testified that she is a senior project manager for Shawmut and for this project she was project manager (Katherine Douglas tr at 9). Douglas acknowledged that Shawmut did visual inspections of scaffolding at the worksite (*id.* at 53-53). Douglas also testified that at the time of the accident, plaintiff was repairing damage to the basement ceiling caused by another contractor at the request of Shawmut's superintendent, Burke (*id.* at 125-126).

Deposition Testimony of Ed Ehmann, JDT Foreman

Ed Ehmann testified that he is a foreman for JDT (Ed Ehmann tr at 7-8). As a foreman, he was responsible for a crew for the project (*id.* at 15, 21). He provided plaintiff with work orders (*id.* at 79-80). He was also responsible for inspecting any equipment used by employees (*id.* at 16). JDT kept their equipment including bakers scaffolds on the first floor (*id.* at 84). He did not inspect equipment that belonged to other contractors (*id.* at 16).

Ehmann testified that on the date of plaintiff's accident, he was working in the basement with plaintiff framing top track and walls (*id.* at 19-20, 23). Plaintiff was using the scaffold to perform work (*id.* at 23). He did not see plaintiff's accident (*id.* at 28). He did not know where plaintiff obtained the scaffold because it was not owned by JDT. Employees of JDT were not permitted to use equipment from other contractors, and if he observed this being done, he would advise JDT employees to stop using that equipment (*id.* at 72-73). Plaintiff could have obtained a baker scaffold owned by JDT from the first floor and set it up in the basement within five to six minutes (*id.* at 66-68).

Deposition Testimony of Milton Sonneberg, Senior Property and Risk Manager for ACHS

Milton Sonneberg testified that ACHS was the property manager for the building in May, 2014 (Sonneberg tr at 8). Sonneberg also testified that in May, 2014, ACHS was not responsible for the daily operation of the building (*id.* at 12 – 13) and that its responsibilities vis-a-vis the building did not commence until the project was complete (*id.* at 29).

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*O’Brien v Port Authority N.Y. & N.J.*, 29 NY3d 27, 37 [2017]).

Labor Law § 240 (1) Claim

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), 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.”

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a “falling worker” or a “falling object” (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep’t 2011] [internal quotation marks omitted]).

The statute “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, “not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). “[T]he single decisive question is whether [a] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v NY Stock Exchange*, 13 NY3d 599, 603 [2009]). Therefore, in order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to “absolute liability”

(see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim. The evidence shows that the scaffold plaintiff used on the day of his accident was inadequate since the scaffold platform collapsed while plaintiff was standing on it (*Szpakowski v Shelby, Rlty.*, 48 AD3d 268, 269 [1st Dept 2008] [“Plaintiffs met their initial burden on their motion for summary judgment by producing evidence that the defective wood planking of the scaffold had collapsed.”], *app denied* 12 NY3d 708 [2009]).

In support of their cross motions and in opposition to plaintiff’s motion, cross moving defendants and Shawmut contend that plaintiff’s conduct was the sole proximate cause of his accident because the scaffold he used did not belong to JDT, and there were bakers scaffolds available for him to use to perform the work that he chose not to use.

A plaintiff’s negligence is the sole proximate cause of their injuries “when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so causing an accident” (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Here, Ehmann, the JDT foreman testified during his deposition that JDT employees were not permitted to use equipment from other contractors, and if he observed this being done, he would advise them to stopping using it (Ehmann tr at 66-68). He also testified that plaintiff could have obtained a baker scaffold owned by JDT from the first floor and set it up in the basement within five to six minutes (*id.* at 72-73). However, Ehmann, did not testify (nor did

any other witness) that he instructed plaintiff that he was expected to use only JDT's equipment (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 662 [2nd Dept 2015] [summary judgment granted to plaintiff on his section 240(1) because "there is no evidence that anyone instructed the plaintiff that he was 'expected to' use the permanent ladder rather than the scaffolding"]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653 – 654 [2nd Dept 2014] [summary judgment granted to plaintiff on his section 240(1) claim because there was no evidence that plaintiff knew he was "expected to" use the staircase rather than the unsecured A-frame ladder that closed while he was descending it.]).

Accordingly, plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim must be granted and Shawmut and cross moving defendants' cross motions for summary judgment in their favor on this claim must be denied. In light of the granting of plaintiff's motion for partial summary judgment on liability, Shawmut and cross moving defendants' cross motions for summary judgment in their favor on plaintiff's Labor Law §§ 241(6) & 200 and common law negligence claims are academic, and their cross motions on these claims are also denied (*Squicaray v Consolidated Edison Co. of NY, Inc.*, 2017 NY Misc LEXIS 4060, 2017 NY Slip Op 32277 [U]; *affmd* 171 AD3d 416 [1st Dept 2019] [holding "[s]ince the court properly granted partial summary judgment in favor of the [plaintiff on his] Labor Law § 240 (1) claim, [third-party defendant's] remaining arguments, concerning plaintiff's Labor Law § 241 (6) claim, are academic" (*citing Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013])]).

Contractual Indemnification Claims

Shawmut

Shawmut seeks summary judgment on its contractual indemnification claims against JDT and Trison. Concerning its contractual indemnification claim against JDT, Shawmut refers to the contract between Shawmut and JDT annexed to plaintiff's summary judgment motion as exhibit 17. However, the contract is not authenticated in plaintiff's moving papers or in Shawmut's cross moving papers. Consequently, because the Shawmut/JDT contract was not authenticated as required by CPLR § 4518 (a), it is inadmissible and may not form the basis to grant summary judgment in Shawmut's favor on its contractual indemnification claim against JDT (*Clarke v American Truck & Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019] [holding agreement between parties was not authenticated and therefore, was not admissible and not an appropriate basis on which to grant summary judgment]).

Regarding Shawmut's contractual indemnification claim against Trison, Shawmut cites to Douglas's deposition testimony in support of its assertion that the construction site access agreement between Shawmut and Trison, annexed to their cross moving papers as exhibit "D", is authenticated. However, while Douglas was asked at her deposition about the Shawmut/Trison site access agreement marked as exhibit "A" at her deposition, the site access agreement attached to Trison's cross moving papers as exhibit "D" does not have a stenographer's exhibit sticker marked as exhibit "A" and bearing the date it was marked or any other indication that it is the exhibit "A" shown to Douglas at her deposition. Therefore, the court cannot ascertain whether exhibit "D" annexed to Shawmut's cross motion is the same document as exhibit "A" shown to Douglas at her deposition. Consequently, exhibit "D" to Shawmut's cross motion, the purported Shawmut/Trison site access agreement, is not properly authenticated, is inadmissible and may

not form the basis to grant Shawmut summary judgment on its contractual indemnification claim against Trison (*id.*).

Accordingly, Shawmut's cross motion for summary judgment on its contractual indemnification claims against JDT and against Trison must be denied.

Cross moving defendants

Cross moving defendants seek summary judgment on their contractual indemnification claims and breach of contract claims against Shawmut and JDT and on their contractual indemnification claim against Trison. None of the three contracts (Nostrand Enterprises/Shawmut, exhibit "FF"; JDT/Shawmut, exhibit "PP"; and Trison/Shawmut, exhibit "OO") annexed to cross moving defendants' attorney's affirmation is properly authenticated as required by CPLR § 4518 (a). Therefore, the three contracts are inadmissible and may not form the basis to grant cross moving defendants summary judgment on their contractual indemnification and breach of contract claims (*Clarke*, 171 AD3d at 406).

Accordingly, cross moving defendants' cross motion for summary judgment on their contractual indemnification and breach of contract claims against Shawmut, JDT and Trison must be denied.

Plaintiff's application to sever the 3rd, 4th, and 5th party actions

Plaintiff seeks to sever the main action from the third, fourth, and fifth-party actions on the grounds that the main action should not be delayed by any remaining discovery in those actions. CPLR § 1010 permits the court to order separate trials of third-party claims and requires the court to consider whether the third-party action(s) will unduly delay the determination of the main action. Here, there will be no delay to the resolution of the main action because on

November 7, 2019, the court issued an order that all discovery is complete and directing the clerk to restore plaintiff's previously filed note of issue on May 16, 2018.¹

Accordingly, plaintiff's application to sever the main action from the third, fourth, fifth-party actions must be denied.

CONCLUSION

Based on the foregoing, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim against defendants is GRANTED, and it is further

ORDERED that plaintiff's motion to sever the main action from the third-party action, fourth-party action and fifth-party action is DENIED; and it is further

ORDERED that 2146 Nostrand Avenue Associates, LLC, ACHS Management Corps., and 49th Broadway LLC's cross motion to dismiss plaintiff's complaint is DENIED; and it is further

ORDERED that 2146 Nostrand Avenue Associates, LLC, ACHS Management Corps., and 49th Broadway LLC's cross motion for summary judgment on their contractual indemnification and breach of contract claims and for dismissal of all cross-claims and counter-claims against them are DENIED; and it is further

ORDERED that Shawmut Woodworking & Supply, Inc.'s cross motion to dismiss plaintiff's complaint is DENIED; and it is further

¹ Given this directive, it is unclear why plaintiff filed a new note of issue on November 12, 2019, since plaintiff claims he wants to avoid delaying resolution of the main action. Had the trial support office accepted the new note of issue rather than reinstating the older note issue, plaintiff would have lost his higher priority on the trial ready calendar. However, trial support followed the court's directive and reinstated the older note of issue.

ORDERED that Shawmut Woodworking & Supply, Inc.'s cross motion for summary judgment on its contractual indemnification claims and for dismissal of all cross claims against it is DENIED.

1/21/20
DATE


PAUL A. GOETZ, 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"/>	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