

Chauca v Rockefeller Univ.

2020 NY Slip Op 30160(U)

January 23, 2020

Supreme Court, New York County

Docket Number: 151548/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

INDEX NO. 151548/2017
MOTION DATE 12/17/2019
MOTION SEQ. NO. 001-003

SERGIO CHAUCA,

Plaintiff,

- v -

THE ROCKEFELLER UNIVERSITY, TURNER
CONSTRUCTION COMPANY, SAFWAY ATLANTIC, LLC
and PRIMIANO ELECTRICAL CORP.,

DECISION + ORDER ON
MOTION

Defendants.

NYSCEF Doc Nos. 36-52, 120-121, 129-142, 149, 158, 162-165, 170-173, and 182 were read on this motion (seq. 001) for summary judgment.

NYSCEF Doc Nos. 82-115, 118-119, 122-124, 143-145, 150, 159, 166-169, and 183 were read on this motion (seq. 002) for summary judgment.

NYSCEF Doc Nos. 53-81, 125-128, 146-148, 151, 160, 174-176, and 184 were read on this motion (seq. 003) for summary judgment.

Motion sequence number 001 by defendant Primiano Electrical Corp. pursuant to CPLR 3212 dismissing the complaint and all cross claims as against it is granted.

Motion sequence number 002 by defendants The Rockefeller University and Turner Construction Company pursuant to CPLR 3212 dismissing the complaint and all cross claims as against them and for summary judgment on their cross claims is granted in part.

Motion sequence number 003 by defendant Safway Atlantic, LLC pursuant to CPLR 3212 dismissing the complaint and all cross claims against it is granted in part.

The motions are consolidated for disposition.

BACKGROUND

Plaintiff brings the instant labor law personal injury action alleging violations of Labor Law §§ 200, 240 (1), and 241 (6) against Defendants along with common law negligence in connection with his fall down a set of temporary exterior stairs on December 7, 2016, at approximately 6:30 a.m., at a construction site located at 1230 York Avenue, New York, NY. Defendants The Rockefeller University ("Rockefeller") and Turner Construction Company ("Turner" and, together with Rockefeller, "Owner") are the owner and general contractor, respectively; defendant Safway Atlantic, LLC ("Safway") is the subcontractor that erected the stairs; and defendant Primiano Electrical Corp. ("Primiano") is the subcontractor that, among other things, supplied or was to supply certain lighting at the construction site.

At oral argument on December 17, 2019, the Court granted in part Primiano's motion in seq. 001 to the extent of dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action and reserved decision on those branches of the motion that are to dismiss the Labor Law § 200 and common law negligence causes of action along with all cross claims. The Court also granted in part Owner's motion in seq. 002 to the extent of dismissing the Labor Law § 200 and common law negligence causes of action, denied the motion as to the Labor Law §§ 240 (1) and 241 (6) causes of action, and reserved on the cross claims. The Court also granted in part Safway's motion in seq. 003 to the extent of dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action, denied the motion as to the Labor Law § 200 and common law negligence causes of action, and denied the motion to dismiss the cross claims.

The Court observed at the oral argument that Plaintiff "conceded and has agreed to dismissal of" the Labor Law §§ 240 (1) and 241 (6) causes of action as against Safway and Primiano. (NYSCEF Doc No. 186 [tr] at 5, lines 15–16.) Plaintiff further conceded and agreed to withdraw his Labor Law § 200 and common law negligence causes of action as against Owner. (*Id.* at 33, lines 17–22.) The Court then denied the branches of the motion of Owner in seq. 002 that were to dismiss the Labor Law §§ 240 (1) and 241 (6) causes of action (*id.* at 33; lines 13–16; at 60, lines 12–21) and denied the branch of the motion of Safway in seq. 003 to dismiss the Labor Law § 200 and common law negligence causes of action and the cross claims against it (*id.* at 60, lines 22–24; at 61, lines 7–9).

The Labor Law § 200 and Common Law Negligence Causes of Action as Against Primiano

As to the balance of the motion in seq. 001 by Primiano to dismiss the Labor Law § 200 and common law negligence causes of action, as is relevant here, it is undisputed that Plaintiff's accident occurred as he descended the subject stairs on December 7, 2016, at approximately 6:30 a.m., and that the stairs were wet due to rainwater. Plaintiff stated that in the minutes prior to his accident he perceived that "[t]here was no lighting" including natural lighting conditions and described conditions generally as "dark." (Plaintiff's 11/17/17 tr at 78, line 17, 20; at 79, line 15; at 80, line 19; at 90, lines 24–25; at 91, lines 2–4.)

As to the wetness of the stairs at the time of the accident, Plaintiff indicated that he was aware it was raining lightly at the time and that the concrete on the ground was wet, but did not anticipate that the subject stairs were wet prior to his initial ascent from the first floor to the second floor shanty, as he "wasn't thinking about it." (*Id.* at 83, line 5–6.) Plaintiff ascended the stairs without incident. When asked, as to the moments prior to his subsequent descent down the stairs and concurrent accident, "[d]o you recall in your mind that you were attentive to the fact that it was raining out and there could be moisture on the ground and in the stairs?" Plaintiff answered, "Yes." (*Id.* at 93, lines 23–25; at 94, lines 2–3.)

When asked if he saw "any problem on the treads" when he "started to descend," Plaintiff answered, "[n]o. It was dark but I was able to walk down the stairs." (*Id.* at 116, lines 12–15.) When then asked, "[w]ere you about to say able to see down the stairs?" Plaintiff replied, "[a] little bit." (*Id.* at 116, lines 16–18.) Plaintiff also indicated that he could see "a little bit" while on a platform three steps from where he fell. (*Id.* at 117, lines 7–9.)

When asked, “[w]hat do you understand was the cause of your slipping?” Plaintiff replied, “[i]t happened so fast. I took three steps. I slipped and fell. It was raining. It was dark. There was no lighting.” (*Id.* at 136, lines 7–12.)

It is undisputed that Turner contracted with Primiano for, among other things, the supply of certain temporary lighting in the vicinity of the subject stairs. Primiano argues in its motion, in sum and substance, that Primiano’s lighting installation work as to the subject stairs was in progress and was not completed at the time of the accident, as it was a two-day installation that began on December 6, 2016, and was completed at some point in the afternoon on December 7, 2016, after approximately two full work shifts.

Primiano further argues, as is relevant here, that it did not supervise or control the work that caused the injury to Plaintiff, as it neither employed Plaintiff nor controlled his access to the subject stairs. Rather, Primiano was retained to install certain temporary lighting which was not yet done. Primiano further argues that the lighting conditions were not a proximate cause of the accident, as Plaintiff’s own testimony is that he was aware the subject stairs were wet prior to descending them and prior to his accident and was able to see down the stairs.

Primiano cites to *Ortiz v Rose Nederlander Associates, Inc.* (103 AD3d 525 [1st Dept 2013]) and argues that while the plaintiff in *Ortiz* had testified there was “poor lighting” on the staircase on which she fell, she attributed her fall to an uneven step. The Appellate Division, First Department held that the plaintiff had failed to raise a genuine issue of material fact as to whether the “poor lighting” was a proximate cause of her fall. Primiano further cites to *Cataudella v 17 John Street Associates* (140 AD3d 508 [1st Dept 2016]), another case where the plaintiff did not attribute a poor lighting condition to his fall, and where the Appellate Division, First Department held that the plaintiff had failed to establish that the poor lighting was a proximate cause of the fall. Primiano then cites to *Sarmiento v C&E Assoc.* (40 AD3d 524 [1st Dept 2004]), where the plaintiff had testified that there was lighting and that he slipped because of wet stairs, and where the Appellate Division, First Department held that “whether the lighting was adequate or not, it was not a proximate cause of this accident.” (*Id.* at 527.)

Safway opposes, arguing that Plaintiff has alleged the lighting was inadequate and that it would be premature to dismiss the complaint as against Primiano. Safway distinguishes the cases cited by Primiano to the extent that, here, Plaintiff testified that it was dark and that there was no lighting.

Owner also opposes. Owner argues that the motion is procedurally defective because Primiano failed to annex the amended summons and complaint and a referenced expert “affidavit” as to the Labor Law § 241 (6) cause of action. Owner argues as to the merits that Primiano was solely responsible for the installation of temporary lighting for the subject stairs, including during construction, and that it was to be operational 24 hours a day. Owner further argues that normal working hours for the provision of temporary lighting and power were 6:30 a.m. to 4:30 p.m. Owner further argues that Primiano was working overnight on December 5 and 6, the two nights preceding the accident, and provided overnight light stands, separate and apart from the temporary lighting being installed, on both overnight shifts.

Owner then argues that Primiano had promised the work of installing the temporary lighting would be finished before the time when Plaintiff's accident occurred, and this was not done. Owner further argues that Primiano knew that workers would be using the subject stairway on the morning of Plaintiff's accident based upon that light stands had been put out for use overnight and to illuminate the area during and between the night shift and day shift when the accident occurred. Owner further argues that it was Primiano that had the authority as to where and how to place and operate the light stands. Last, as is relevant here, and similarly to Safway, Owner argues that Plaintiff testified that inadequate lighting was a cause of his fall.

The project specifications between Turner and Primiano submitted state that "[t]his subcontract shall make provision that all temporary lighting in stairways and security lighting be operational during the 24-hours [sic] of a day." (Zunno affirmation, exhibit O, at 4.)

Plaintiff in his opposition papers argues that this is not a means and methods case. As previously discussed, Plaintiff conceded at the oral argument that the case is means and methods, and as such, the Court will not recite Plaintiff's inapposite arguments from the papers as to premises liability. As to Primiano, as is relevant here, Plaintiff argues that its liability rests on its failure to have installed the temporary lighting as required prior to the accident.

Primiano argues in reply, as is relevant here, that Turner was aware Primiano had not completed the temporary lighting installation prior to Plaintiff's accident but opened the area and directed Plaintiff to use the stair tower prior to its completion. Primiano further argues that the inadequate lighting, if any, was due to Turner opening the stair tower prematurely. Primiano then argues that the subject light stands were placed at the direction of Turner. Primiano then reiterates its argument that "the temporary lighting was not *the* proximate cause of the accident." (Affirmation of Fullerton ¶ 17 [emphasis added].)

At the Primiano EBT, James Ryan testified as to the light stands that "the Turner super was requesting what he needed." (Primiano EBT at 108, lines 21-22.) Ryan also indicated that if temporary lighting was being put in, it suggested that someone would be using the stairway. (*Id.* at 112, lines 9-13.) Ryan also testified that the overnight standby electrician, Richie Sorentino, was responsible for placing the light stands, at the direction of Turner, and he believed he would not make determinations as to whether any lighting was adequate or not, but rather would place lighting at the request of Turner to the specifications of Turner. (*Id.* at 112, line 3-8.)

The Defense and Indemnification Cross Claims against Safway

As is relevant here, and as is discussed more fully below, Owner argues in its motion in seq. 002 that it is entitled to summary judgment against Safway on its cross claims for defense costs and expenses, contribution, breach of contract for failure to defend, and common law and contractual indemnification. Owner cites to its agreement with Safway, which states that Safway assumed "the entire responsibility and liability for any and all . . . damage or injury . . . caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work" and agreed to indemnify and hold Owner harmless and to assume the defense of any action brought against owner by reason of such claims. Owner argues that Rockefeller and Turner are listed as additional insureds on Safway's Certificate of Insurance.

Safway argues in opposition that granting summary judgment on Owner's cross claims is premature prior to a determination that Plaintiff's injury was caused by, resulted from, or arose out of Safway's work, which would admittedly trigger the indemnification clause.

It is conceded by Plaintiff that Owner was not negligent, and as such, there is no issue as to Owner seeking indemnification for its own negligence.

DISCUSSION

The Court having reserved on the branch of Primiano's motion in seq. 001 to dismiss the Labor Law § 200 and common law negligence causes of action and all cross claims, based upon the papers and the oral argument, the Court now grants the balance of the motion, and the complaint and all cross claims are dismissed with prejudice as against Primiano.

Labor Law § 200 states, in applicable 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 protections to such persons."

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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). There are two distinct, fact-dependent standards applicable to section 200 cases: (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 an inherent part of the premises (*see McLead v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012].)

"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"]).

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]).

Here, as the Court previously held at the oral argument, and as conceded by Plaintiff insofar as based upon the case Plaintiff withdrew his Labor Law § 200 and common law negligence causes of action as against Owner, this is a means and methods case. (*See McGarry v CVP I LLC*, 55 AD3d 441, 442 [1st Dept 2008].) The Court finds that Primiano has shown prima facie that it did not exercise actual supervision over the injury producing work, which for the purposes of the instant motion includes the erection of the subject stairs and Plaintiff's use of the subject stairs, neither of which were in the control of movant Primiano.

Notably, the Court finds that Primiano's arguments as to proximate cause are misplaced. Contrary to the argument made in the reply affirmation of movant, "[i]t is well settled that there can be more than one proximate cause of an accident." (*Ileiwat v PS Marcato Elevator Co. Inc.*, 178 AD3d 517 [1st Dept 2019].) The Court agrees with Safway and Owner that based upon a fair reading of the Plaintiff's EBT, Plaintiff has attributed that it was dark and that there was no lighting at the time of his fall as being a cause of the accident. As such, if the Court were to reach proximate cause notwithstanding other facts of this case, the Court would deny the motion, as the Court agrees with Safway and Owner that the cases cited by Primiano are distinguishable.

Nevertheless, the opponents fail to raise a genuine issue of material fact in response to Primiano's prima facie showing. The Court finds that while the subcontract between Turner and Primiano does provide that temporary lighting in stairways was to be operational 24 hours a day, this provision cannot logically be operative where the temporary lighting has not yet been installed fully, signed off on by Turner, and put into operation in the first instance. The Court finds further that Owner has failed to show by proof in admissible form that any "light stand" put into operation by Primiano prior to the accident would have provided any illumination in the area where the accident occurred.

Indeed, the record is bereft of a statement as to the exact location of any light stand placed by Primiano prior to the accident. Further, Ryan testified for Primiano that any and all light stands placed prior to the accident were placed at the direction of Turner. While Owner argues in its papers that it was Primiano that could decide to place light stands to prevent or cure a defective condition, counsel in the opposition papers makes this assertion without citation, and this mere affirmation without evidentiary value is belied by the EBTs of both Primiano and Turner.

As such, the complaint is dismissed in its entirety as against Primiano. Moreover, as Plaintiff's alleged injuries were not caused by, resulting from, or arising out of or occurring in connection with the execution of Primiano's work, all cross claims against Primiano are also dismissed, and the branch of the motion by Owner for summary judgment on its cross claims against Primiano is denied. Further, as the case has not been dismissed against Safway, and as Safway acknowledges that indemnification is triggered upon a finding the injury was caused by, resulted from, or arose out of its work, conditional summary judgment on the cross claims in favor of Owner and against Safway is appropriate. A final determination will await the trier of fact.

CONCLUSION

Accordingly, it is

ORDERED that motion sequence number 001 by defendant Primiano Electrical Corp. pursuant to CPLR 3212 dismissing the complaint and all cross claims as against it is granted, and the complaint and all cross claims are dismissed with prejudice as against Primiano; and it is further

ORDERED that motion sequence number 002 by defendants The Rockefeller University and Turner Construction Company pursuant to CPLR 3212 dismissing the complaint and all cross claims as against them and for summary judgment on their cross claims is granted to the extent that the Labor Law § 200 and common law negligence causes of action are dismissed with prejudice as against Rockefeller and Turner and the cross claims against Safway are granted conditionally to the extent moved on, and the motion is otherwise denied; and it is further

ORDERED that motion sequence number 003 by defendant Safway Atlantic, LLC pursuant to CPLR 3212 dismissing the complaint and all cross claims against it is granted in part to the extent that the Labor Law §§ 240 (1) and 241 (6) causes of action are dismissed with prejudice as against Safway, and the motion is otherwise denied; and it is further

ORDERED that all parties shall serve a copy of this order with notice of entry on all other parties within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that Primiano shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, serve a copy of this order with notice of entry on the clerk, who shall enter judgment accordingly; and it is further

ORDERED that the action is severed and shall continue as against Rockefeller, Turner, and Safway.

The foregoing constitutes the decision and order of the Court.

1/23/2020
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

Robert D. Kaish
HON. ROBERT D. KAISH
NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE