Robles v 635 Owner, LLC
2020 NY Slip Op 30479(U)
February 13, 2020
Supreme Court, New York County
Docket Number: 162049/2015
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANGEL ROBLES, Index No. 162049/2015

Plaintiff

- against - DECISION AND ORDER

635 OWNER, LLC, and W5 GROUP LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendant to recover damages for personal injury sustained May 16, 2013, when he fell from a ladder while inspecting the mezzanine as part of his work on premises owned by defendant 635 Owner, LLC, at 635 6th Avenue, New York County, on a construction project for which defendant W5 Group LLC was the general contractor. Plaintiff moves for summary judgment on his claims under New York Labor Law §§ 240(1) and 241(6). C.P.L.R. § 3212(b) and (e). Plaintiff's stipulation dated March 27, 2019, discontinuing his Labor Law § 200 and negligence claims against 635 Owner resolves 635 Owner's cross-motion for summary judgment dismissing those claims. W5 Group cross-moves for summary judgment dismissing plaintiff's Labor Law § 241(6) claim against

W5 Group. C.P.L.R. § 3212(b) and (e). 635 Owner separately moves for summary judgment on its contractual indemnification cross-claim against W5 Group. Id. W5 Group cross-moves for summary judgment dismissing 635 Owner's cross-claims for implied indemnification, contribution, and breach of a contract to procure insurance. Id. W5 Group separately moves to amend its answer, C.P.L.R. § 3025(b), to interpose the defense that New York Workers' Compensation Law §§ 11 and 29(6) bars plaintiff's action, and for summary judgment, C.P.L.R. § 3212(b), dismissing the complaint against W5 Group on that basis. At oral argument, the parties stipulated to treat all the cross-motions as standalone motions. For the reasons explained below, the court grants 635 Owner's motion and grants plaintiff's and W5 Group's motions in part.

II. W5 GROUP'S DEFENSE BASED ON WORKERS' COMPENSATION LAW §§ 11 AND 29

W5 Group opposes plaintiff's motion for summary judgment based on the admittedly unpleaded defense that Workers' Compensation Law §§ 11 and 29(6) bar plaintiff's action, but also moves to amend W5 Group's answer to plead that defense and for summary judgment based on the defense.

A. Opposition to Plaintiff's Motion

W5 Group contends that Workers' Compensation Law §§ 11 and 29(6) bar plaintiff's claims against W5 Group because plaintiff was its special employee. W5 Group may oppose plaintiff's motion for summary judgment based on an unpleaded defense supported by evidence of the defense. Deutsche Bank Natl. Trust Co. v. Desilva, 175 A.D.3d 1221, 1222 (1st Dep't 2019); JPMorgan Chase Bank, N.A. v. Salmon, 154 A.D.3d 603, 603 (1st Dep't 2017); Rivera v. New York City Tr. Auth., 11 A.D.3d 333, 333 (1st Dep't 2004). James Costello testified at his deposition that he was the project manager of Waldorf Demolition, which was the name under which W5 Group conducted business. His and plaintiff's deposition testimony that Costello supervised plaintiff indicates the control essential to establish a special employment relationship. Fung v. Japan Airlines Co., Ltd., 9 N.Y.3d 351, 359 (2007); Thompson v. Grumman Aerospace Corp., 78 N.Y.2d 553, 558 (1991); Grilikhes v. International Tile & Stone Show Expos, 90 A.D.3d 480, 482 (1st Dep't 2011); Bautista v. David Frankel Realty, Inc., 54 A.D.3d 549, 550 (1st Dep't 2008).

On the other hand, the testimony by Costello that he was managing multiple projects simultaneously, limiting his presence at plaintiff's job site, and that plaintiff usually ran the job

himself, plus plaintiff's testimony that no one instructed him to inspect the mezzanine, the task he was engaged in when injured, raise factual issues regarding that control. Warnick v. 1211 S. Blvd. LLC, 93 A.D.3d 402, 403 (1st Dep't 2012); Bautista v. David Frenkel Realty, Inc., 54 A.D.3d at 553; Bellamy v. Columbia Univ., 50 A.D.3d 160, 162 (1st Dep't 2008). See Grilikhes v. International Tile & Stone Show Expos, 90 A.D.3d at 482-83. After all, W5 Group was the general contractor in charge of all the work at the site, hired other employers as subcontractors, and thus exercised overall supervision of every worker on the site, whether or not the workers were W5 Group's employees. In fact, in opposing plaintiff's motion and supporting W5 Group's motion for partial summary judgment on plaintiff's Labor Law claims, W5 Group expressly disavows its supervision and control over plaintiff's work.

The testimony by plaintiff that he had never heard of W5 Group and was employed by either Waldorf Demolition or nonparty Calvin Maintenance is inconclusive regarding his employer's identity. Although Costello testified that W5 Group conducted business under the name Waldorf Demolition and owned or was otherwise related to Calvin Maintenance, neither this testimony nor any other evidence presented by W5 Group establishes that

Calvin Maintenance was the same entity as W5 Group and Waldorf Demolition. Fung v. Japan Airlines Co., Ltd., 9 N.Y.3d at 360; Soodin v. Fragakis, 91 A.D.3d 535, 536 (1st Dep't 2012); Demaj v. Pelham Realty, LLC, 82 A.D.3d 531, 532 (1st Dep't 2011). Costello admitted that he was unsure about the relationship between W5 Group and Calvin Maintenance, testifying inconsistently that the former owned or was a sister corporation of the latter. Even if W5 Group owned Calvin Maintenance, or Calvin Maintenance was a subsidiary of W5 Group, or the two entities shared common owners, those facts do not transform an employee of one into the employee of the other or establish the singularity of entity required to apply the Workers' Compensation Law bar to an employee's claim. Kolenovic v. 56 th Realty, LLC, 139 A.D.3d 588, 589 (1st Dep't 2016); Hughes v. Solovieff Realty Co., L.L.C., 19 A.D.3d 142, 143 (1st Dep't 2005). Costello further testified inconsistently that Calvin Maintenance was merely a paymaster for members of a laborers' union who performed interior demolition, such as plaintiff performed, but also that Calvin Maintenance was their employer and that W5 Group employed only management personnel, not union laborers.

While the Workers' Compensation insurance policy that covered plaintiff would be dispositive of the employer entitled

to avail itself of Workers' Compensation Law §§ 11 and 29(6) to bar his claims, Gherghinoiu v. ATCO Props. & Mgt., Inc., 32 A.D.3d 314, 315 (1st Dep't 2006), W5 Group presents no such policy. Thus W5 Group falls far short of demonstrating it was a special employer that controlled plaintiff's work as required to invoke the Workers' Compensation Law bar. Thompson v. Grumman Aerospace Corp., 78 N.Y.2d at 558; Bellamy v. Columbia Univ., 50 A.D.3d at 162.

B. W5 Group's Motion to Amend Its Answer

Leave to amend pleadings is to be freely granted unless it would surprise or otherwise prejudice the opposing party. C.P.L.R. § 3025(b); Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Ghandi, 24 N.Y.3d 403, 411 (2014); Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017). As set forth above, W5 Group fails to demonstrate its control over plaintiff or that W5 Group, Waldorf Demolition, and Calvin Maintenance were identical entities to establish any merit to its proposed affirmative defense. Kolenovic v. 56th Realty, LLC, 139 A.D.3d at 589. See Ramirez v. Elias-Tejada, 168 A.D.3d 401, 404 (1st Dep't 2019).

The evidence W5 Group presents to support its defense,

moreover, is based on its own witnesses' knowledge, yet W5 Group fails to explain why, when it originally answered, it did not know the very facts on which, three years later, it bases its proposed defense. Nevertheless, even if W5 Group's unexplained delay in seeking to interpose the Workers' Compensation Law bar until over three years after commencing the action is not reason alone to deny W5 Group's motion to amend its answer, see Miraglia v. H & L Holding Corp., 67 A.D.3d 513, 514 (1st Dep't 2009); Bellamy v. Columbia Univ., 50 A.D.3d at 166, the lack of merit to that defense compels that result. Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d 166, 170 (1989); Reyes v. BSP Realty Corp., 171 A.D.3d 504, 504 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d at 612.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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

Plaintiff seeks summary judgment on his Labor Law § 240(1) claim based on his use of a ladder that failed to prevent his fall. W5 Group contends that the evidence does not establish the ladder's failure and instead shows that plaintiff's misuse of the ladder was the sole proximate cause of his injury. 635 Owner does not oppose plaintiff's motion for summary judgment on this

claim.

Defendants' failure to provide adequate safety devices to protect against elevation related hazards in construction, as required by Labor Law § 240(1), imposes absolute liability on the owner and general contractor of the construction site, if that failure proximately caused plaintiff's injury. Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 338 (2008); Albanese v. City of New York, 5 N.Y.3d 217, 219 (2005); Abbatiello v. Lancaster Studio Assoc., 3 N.Y.3d 46, 50-51 (2004); Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 287, 289 (2003). Plaintiff is not required to show a defect in the ladder to establish a violation of Labor Law § 240(1). Caminiti v. Extell W. 57th St. LLC, 166 A.D.3d 440, 441 (1st Dep't 2018); Hill v. City of New York, 140 A.D.3d 568, 570 (1st Dep't 2016); Fanning v. Rockefeller Univ., 106 A.D.3d 484, 485 (1st Dep't 2013); Estrella v. GIT Indus., Inc., 105 A.D.3d 555, 555 (1st Dep't 2013).

Plaintiff testified that he used the ladder on the first floor of the building undergoing demolition, to inspect the mezzanine level. He did not know who erected the ladder. As he attempted to descend the ladder, its feet slid backwards, the top skidded down the wall against which it was placed, and the ladder

fell, causing him to fall to the first floor on top of the ladder.

Plaintiff's testimony that the unsecured ladder he was using moved establishes a violation of Labor Law § 240(1). Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 544 (1st Dep't 2018); Merino v. Continental Towers Condominium, 159 A.D.3d 471, 472 (1st Dep't 2018); Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 583 (1st Dep't 2018). The failure of the ladder to provide adequate protection from the hazards of work at an elevation also demonstrates that plaintiff was not the sole proximate cause of his injury. Nolan v. Port Auth. of N.Y. & N.J., 162 A.D.3d 488, 489 (1st Dep't 2018); Plywacz v. 85 Broad Street LLC, 159 A.D.3d at 543; Ross v. 1510 Assoc. LLC, 106 A.D.3d 471, 471 (1st Dep't 2013); Lizama v. 1801 Univ. Assoc., LLC, 100 A.D.3d 497, 498 (1st Dep't 2012).

W5 Group's contention that plaintiff placed the ladder upside down is based on Costello's testimony that, after the ladder and plaintiff fell, the ladder's feet were pointed toward the wall against which it had been placed. While Costello was present when plaintiff fell, Costello admitted that he was not looking at plaintiff as he fell and observed him only after he

fell. This testimony demonstrates that W5 Group's contention about the placement of the ladder upside down is only speculation. Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568; Kebe v. Greenpoint-Goldman Corp., 150 A.D.3d 453, 454 (1st Dep't 2017); Ortiz v. Burke Ave. Realty, Inc., 126 A.D.3d 577, 578 (1st Dep't 2015). Moreover, no evidence indicates that plaintiff placed the ladder in whatever position the ladder was in.

B. Plaintiff's Labor Law § 241(6) Claim

Plaintiff also seeks summary judgment on his Labor Law § 241(6) claim. W5 Group contends that the regulations under the statute on which plaintiff bases his § 241(6) claim are inapplicable. 635 Owner contends that plaintiff was the sole proximate cause of his injury and that the conflict between plaintiff's and Costello's testimony regarding how plaintiff's injury occurred precludes summary judgment. In the stipulation dated March 27, 2019, plaintiff limited the regulatory provisions on which he bases his claim to 12 N.Y.C.R.R. § 23-1.21(b)(4)(i) and (iv).

Plaintiff was using the ladder merely to access the mezzanine from the first floor and was not performing demolition or construction tasks from the ladder as required for 12

N.Y.C.R.R. § 23-1.21(b)(4)(iv) to apply. See Vargas v. New York City Tr. Auth., 60 A.D.3d 438, 440 (1st Dep't 2009); Montalvo v. J. Petrocelli Constr., Inc., 8 A.D.3d 173, 176 (1st Dep't 2004). 12 N.Y.C.R.R. § 23-1.21(b)(4)(i) requires that portable ladders used as a regular means of access between floors be "nailed or otherwise securely fastened in place." Plaintiff's testimony that the ladder's feet slipped away from the wall as he attempted to descend it demonstrates that the ladder was not fastened. Of course had it been secured, whether by human or mechanical means, any misplacement of the ladder upside down likely would have been discovered and rectified during the securing process. Since defendants do not address any of the specific requirements of 12 N.Y.C.R.R. § 23-1.21(b)(4)(i), defendants fail to demonstrate that this provision is inapplicable. Alameda-Cabrera v. Noble Elec. Contr. Co., Inc., 117 A.D.3d 484, 486 (1st Dep't 2014); Ortega v. Everest Realty LLC, 84 A.D.3d 542, 544 (1st Dep't 2011). Even if plaintiff misplaced the ladder, contrary to 635 Owner's contention, he was not the sole proximate cause of his injury because, as addressed above, the unsecured ladder's failure to protect plaintiff from falling contributed to his injury. Addonisio v. City of New York, 112 A.D.3d 554, 555 (1st Dep't 2013); Vargas v. New York City Tr. Auth., 60 A.D.3d at 440.

W5 Group thus fails to sustain its burden to dismiss plaintiff's Labor Law § 241(6) claim, but plaintiff in turn fails to sustain his burden to obtain summary judgment on that claim. While plaintiff testified that electricians used the same ladder the day before and that the ladder was the sole means of access between the first floor and the mezzanine, no evidence demonstrates that the ladder was used as a regular means of access between the two floors, requiring the ladder to be fastened or secured. Terc v. 535 Coster Realty Inc., 176 A.D.3d 562, 563 (1st Dep't 2019).

IV. MOTIONS FOR SUMMARY JUDGMENT ON CROSS-CLAIMS

As set forth above, 635 Owner moves for summary judgment on its contractual indemnification claim against W5 Group. W5 Group cross-moves for summary judgment dismissing 635 Owners' cross-claims for implied indemnification, contribution, and breach of a contract to procure insurance.

A. Summary Judgment in 635 Owner's Favor

635 Owner, as the Owner, and W5 Group, as the Contractor, entered a contract dated December 17, 2012, for the demolition work at the premises. Gianna Checchini, the project manager from 635 Owner's parent entity, authenticated the parties' signatures on the contract at her deposition. B & H Florida Notes LLC v.

Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017). The contract obligates the Contractor to "indemnify and hold harmless" the Owner

> from and against all losses, liabilities, damages, judgments, costs, fines, penalties, actions or proceedings and attorneys' fees, and shall defend the [Owner] in any action or proceeding, including appeals, for personal injury or death of any person . . . as a result of the (i) acts, omissions or other conduct of Contractor . . . in connection with Contractor's performance of the Work . . . .

Aff. of Debora Pitman Ex. A, at 4. Since the contract's indemnification provision also specifies that the indemnification is to the fullest extent permitted by law, any negligence by 635 Owner does not bar enforcement of the contract to the extent that 635 Owner was not negligent, or its negligence did not contribute to plaintiff's injury. Enforcement to that extent respects the prohibition against 635 Owner's indemnification for its own negligence. N.Y. Gen. Oblig. Law § 5-322.1; Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210-11 (2008); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018).

W5 Group opposes 635 Owner's motion based on factual issues regarding 635 Owner's negligence, even though, as set forth

above, plaintiff discontinued his Labor Law § 200 and negligence claims against 635 Owner. The authority W5 Group cites to support 635 Owner's negligence holds only that a defective ladder in a building constitutes a dangerous condition, not that the building owner is necessarily liable for the ladder; the owner was liable because it supplied the ladder and its agents were aware of its obvious missing rung before the plaintiff was injured descending the ladder. Higgins v. 1790 Broadway Assoc., 261 A.D.2d 223, 225 (1st Dep't 1999). See Russo v. Hudson View Gardens, Inc., 91 A.D.3d 556, 557 (1st Dep't 2012). The owner's liability for a defective ladder depends on its control over the use of the ladder. Lombardi v. Stout, 80 N.Y.2d 290, 295 (1992); Estrella v. GIT Indus., Inc., 105 A.D.3d at 556; Castellon v. Reinsberg, 82 A.D.3d 635, 636 (1st Dep't 2011).

Here, plaintiff testified that he was supervised by only Costello and Calvin Maintenance's owners and did not know who owned the premises. Costello also testified that he supervised plaintiff, but that plaintiff usually worked independently. Plaintiff and Costello further testified that Waldorf Demolition or Calvin Maintenance provided all the equipment, including ladders, and that the building provided no equipment. Based on this testimony that 635 Owner did not supervise or control

plaintiff's work when he was injured and maintained no control over the ladder's use, 635 Owner's liability would be purely vicarious, entitling it to contractual indemnification, including defense expenses, against W5 Group. Martinez-Gonzalez v. 56 W. 75th St., LLC, 172 A.D.3d 616, 617 (1st Dep't 2019); O'Leary v. S&A Elec. Contr. Corp., 149 A.D.3d 500, 503 (1st Dep't 2017); Paulino v. Bradhurst, LLC, 144 A.D.3d 430, 431 (1st Dep't 2016); Quiroz v. Wells Reit-222 E. 41st St., LLC, 128 A.D.3d 442, 443 (1st Dep't 2015).

Only if the ladder served as the functional equivalent of a staircase between the first floor and the mezzanine and was placed so as to pose a hazard on the premises of which 635 Owner received actual or constructive notice, would 635 Owner's indemnification be reduced to the extent of its negligence. CITES? While no evidence establishes such facts, neither does this record demonstrate that the ladder did not function as a staircase, nor that the 635 Owner was not on notice of the hazard that staircase posed. See, e.g., Johnson v. 675 Coster St. Hous. Dev. Fund, 161 A.D.3d 635, 636 (1st Dep't 2018); Javier v. New York City Hous. Auth., 161 A.D.3d 615, 615 (1st Dep't 2018); Branch v. SDC Dscount Store, Inc., 127 A.D.3d 547, 547 (1st Dep't 2015).

B. Summary Judgment Dismissing Cross-Claims

W5 Group contends further that 635 Owner's implied indemnification and contribution claims must be dismissed based again on factual issues regarding 635 Owner's negligence and based on W5 Group's motion to amend its answer to include a defense under the Workers' Compensation Law that would bar plaintiff's claims. As discussed above, plaintiff no longer claims 635 Owner's negligence, and the current record fails to support such a claim or W5 Group's defense under the Workers' Compensation Law. 635 Owner's potential negligence, moreover, is not a basis on which to dismiss its contribution claim. See, e.g., Essex St. Corp. v. Tower Ins. Co. of N.Y., 153 A.D.3d 1190, 1197 (1st Dep't 2017); McCulloch v. One Bryant Park, 132 A.D.3d 491, 493 (1st Dep't 2015); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014). The determination that W5 Group owes contractual indemnification to 635 Owner, even if reduced according to its fault, renders the relief sought via implied indemnification and contribution duplicative of the contractual indemnification and thus academic in any event.

Finally, W5 Group contends that 635 Owner's claim for W5 Group's breach of its contract to procure insurance covering 635 Owner duplicates its contractual indemnification claim and lacks

merit because 635 Owner admitted that W5 Group's insurer, AmTrust International Underwriters, already was paying for 635 Owner's defense. 635 Owner admits being provided a defense to date, but claims that W5 Group has failed to provide $5,000,000 in primary coverage as required by the contract.

While evidence establishing the owner's coverage as an additional insured for the agreed policy limits would require dismissal of its claim for breach of the contract to procure insurance, Aramburu v. Midtown W.B, LLC, 126 A.D.3d 498, 501 (1st Dep't 2015); Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013), documents W5 Group produced in disclosure reveal that W5 Group procured only $1,000,000 in primary, non-excess coverage out of $6,000,000 in aggregate coverage. W5 Group fails to present a policy showing that it in fact procured the contractually required coverage. Having failed to demonstrate satisfaction of the contractual obligation to procure insurance, W5 Group is not entitled to dismissal of 635 Owner's cross-claim for breach of the contract to procure insurance. Prevost v. One City Block LLC, 155 A.D.3d 531, 536 (1st Dep't 2017); Kwoksze Wong v. New York Times Co., 297 A.D.2d 544, 547 (1st Dep't 2002). See Aramburu v. Midtown W.B, LLC, 126 A.D.3d at 501; Mathews v. Bank of Am., 107 A.D.3d at 496.

V. CONCLUSION

For the reasons explained above, the court grants plaintiff's motion for summary judgment on his Labor Law § 240(1) claim and the motion for summary judgment by defendant 635 Owner, LLC, on its contractual cross-claim against defendant W5 Group LLC for defense expenses and indemnification to the extent that 635 Owner's negligence did not contribute to plaintiff's injury. C.P.L.R. § 3212(b) and (e). The court also grants defendant W5 Group LLC's cross-motion for summary judgment to the extent of dismissing plaintiff's Labor Law § 241(6) claim based on 12 N.Y.C.R.R. § 23-1.21(b)(4)(iv). Id. The court otherwise denies the motions and cross-motions. This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: February 13, 2020

LUCY BILLINGS, J.S.C.

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J.S.C.