

Diakite v GP-258 N. 9th St., LLC

2020 NY Slip Op 31020(U)

March 3, 2020

Supreme Court, Bronx County

Docket Number: 22633-2013 Judge Tapia

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13**

ALFOUSSEYNI DIAKITE,

Plaintiff,

Index: 22633-2013

Hon. Fernando Tapia, J.S.C.

- against -

GP-258 NORTH 9TH STREET, LLC, PINE BUILDERS
CORP., E.H. BUILDERS CORPORATION a/k/a E.H.
GENERAL CONTRACTORS and WILBOURN
CONSTRUCTION LLC,

Motion Seq. 006,007, & 008

Defendants.

DECISION

Defendants GP-258 NORTH 9TH STREET, LLC (GP-258) (Seq 006), PINE BUILDERS CORP. (Pine Builders)/E.H. BUILDERS CORPORATION (EH Builders) (Seq 007) and WILBOURN CONSTRUCTION LLC (Wilbourn) (Seq 008) in this labor law action move pursuant to CPLR§3212, granting defendants summary judgment dismissing plaintiff's complaint and all causes of action based upon common law negligence and/or under Labor Law §240(1), §241(6) and 200, and NYC Administrative Code. Additionally, defendants in privity of contract seek summary judgment over and against each other for contractual indemnification and/or breach of contract claims. Pine Builders and EH Builders seek to dismiss plaintiff's claims on the supplementary grounds that the Workers' Compensation Law bars them and that EH Builders owed no duty to any party because it was not the owner and did not perform any work or enter into any contracts. Plaintiff pursuant to CPLR 3212, cross moves for summary judgment against all defendants on its Labor Law §240(1) and §241(6) claims.

In response to defendants' motions for summary judgment, the lone sections plaintiff defends, opposes, and cross moves (Seq 006) for summary judgment are based upon Labor Law §240(1) and §241(6). Plaintiff did not oppose the dismissal of his claims against EH Builders and Pine Builders. Accordingly, plaintiff's claims as to commons law negligence, Labor Law §200, NYC Administrative Code, and all his claims against EH Builders and Pine Builders are deemed

abandoned, and the defendants are entitled to summary judgment dismissing plaintiff's claims thereunder. The motions are consolidated for disposition.

Facts

This is an action by an employee of Pine Builders to recover monetary damages for personal injuries allegedly sustained by him on September 21, 2012, as a result of the accident on a construction project. GP-258 was the owner of the property, located at 258 North 9th Street, Brooklyn, New York (Construction Site). GP-258 retained Pine Builders by contract for general construction services concerning the erection of a new building. Wilbourn, who was not a party to the contract, was retained by Pine Builders to perform pile driving on site.

Plaintiff was assigned by a Pine Builder supervisor to assist a Wilbourn employee who was operating a large machine, which was used to drive large hollow iron bars in the ground to construct the foundation of a new building.¹ The process used that day required plaintiff to run a cord through the pipe; the cord was then attached to an heavy machine.² Once attached, the machine operator would lift the long heavy pipe in a vertical position off the ground a few feet and hold it over the designated hole.³ Thereafter, plaintiff would manually guide the bar into a hole in the ground.⁴ After the bar was manually aligned hanging over the hole, a machine would drive it into the ground.⁵

Plaintiff's assigned task on the accident date was to attach a cord to a heavy, hollow iron bar and align it with the designated hole once the machine operator lifted the pipe and hung it over the hole before it is driven into the ground.⁶ The incident occurred after the plaintiff

¹ Diakite EBT at pgs. 18-23.

² *Id.* at pgs. 24-26, 34-35, 129.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

attached a cord to a bar, and the machine lifted the bar, the bar became disconnected from the cord as it was being lowered into the hole, striking the plaintiff.⁷

Summary Judgment Standard

In a motion for summary judgment under CPLR § 3212, it is well settled that the non-movant is entitled to the evidence being viewed in the light most favorable and affording them with the benefit of every favorable inference that can be drawn when assessing a summary judgment motion.⁸ The proponent “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”.⁹

I. Labor Law § 240(1)

Defendants argue plaintiff's Labor Law 240(1) claims must be dismissed because the hallow iron bar swung from only a minuscule height, and all the necessary safety types of equipment were provided. Accordingly, defendants posit, plaintiff's actions in improperly securing and pulling on the bar were the sole proximate cause of his accident. They further argue plaintiff was operating outside the scope of his employment and against the instructions of his immediate supervisor at the time of the accident.

Labor Law § 240 (1) 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.”

⁷ *Id.* 42-43.

⁸ See *Kesselman v. Lever House Restaurant*, 29 AD3d 302 (1st Dept 2006); *Goldman v. Metropolitan Life Ins. Co.*, 13 A.D.3d 289 (1st Dept 2004).

⁹ *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 (1985).

Labor Law § 240(1) imposes a nondelegable duty on owners and contractors to maintain a safe workplace for all workers at the site.¹⁰ The mere occurrence of an accident, however, is not enough to show that the statute was violated.¹¹ In deciding a claim pursuant to Labor Law § 240(1) “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.”¹² The Court of Appeals has held that if “the harm to plaintiff was the direct consequence of the application of the force of gravity”,¹³ the protections afforded to plaintiff under Labor Law § 240(1) are appropriate. The Court continued, stating that “the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent” may invoke the protections of Labor Law § 240(1).¹⁴

Here, plaintiff testified that on the date of the accident, he was working with a machine operator employed by Wilbourn, that was putting metal in the ground.¹⁵ He assisted the operator by attaching a cord to a six feet long and foot in diameter wide heavy iron metal bar. Plaintiff states that the metal bar was a large unit that weighed about 150 pounds. Plaintiff would then pull on the cord to straighten the metal and aligning it with a hole in the ground as the machine lifted the item vertically around 18 inches of the ground.¹⁶ Once the iron bar was guided in the vertical position over the hole, the machine would slowly release it into the hole.¹⁷ During the lifting and moving, the bar detached from the cable and fell on the plaintiff.

¹⁰ *Blake v. Neighborhood Hous. Svcs. of NYC*, 1 NY3d 280, 286 (2003).

¹¹ *Id.* at 289.

¹² *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009).

¹³ *Id.* at 604.

¹⁴ *Id.* at 605.

¹⁵ Diakite EBT at pgs 18 -19.

¹⁶ *Id.* at pgs. 20-22.

¹⁷ *Id.* at pgs. 26-27.

The submitted evidence has shown that the alleged harm was the direct result from the application of the force of gravity to the six feet long and foot in diameter wide heavy iron metal bar was being lowered into the casing. Moreover, it cannot be said that the elevation differential was de minimis, considering the weight of the iron metal bar and the amount of gravitational force it was generating over the course of its descent.

While plaintiff establishes that the alleged injuries were the result of force of gravity, it remains to be seen whether accident was the “direct consequence of [defendant's] failure to provide adequate protection against [that] risk.”¹⁸ Here, neither party meets its burden concerning this issue. Defendants’ failed to demonstrate that no safety guards were required for the work being performed and plaintiff fails to demonstrate that these safety guards could have prevented the accident. In papers submitted, no parties submitted any evidence or independent expert testimony demonstrating whether safety guard was required on the jaw block. As such, the issue of whether safety guards on jaw block the type of safety device required by the statute is an issue of fact.¹⁹

This court, furthermore, rejects the defendants' contention that plaintiff was the sole proximate cause of his injuries because of his failure to execute task properly.²⁰ Under a Labor Law 240(1) claim, Court of Appeals has held that a statutory violation cannot “occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the

¹⁸ *Id.* at 603.

¹⁹ See *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 11 (2011).

²⁰ See *Somereve v Plaza Constr. Corp.*, 136 AD3d 537, 540 (2016) (“Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence”).

plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation".²¹

Here, there is a factual issue as to whether safety guards were statutorily required, therefore, as matter of law, summary judgment motion on this claim may not be granted. There are also questions of facts abound on whether plaintiff's actions were the sole proximate cause of his injuries. These questions relate to whether the (1) plaintiff was following instructions as provided by his supervisor;²² (2) whether the machine operator placed the concrete housing in a precarious position or somehow caused the accident;²³ and (3) whether a language barrier prevented the plaintiff from comprehending instructions from the machine operator or supervisor.²⁴

II. Labor Law 241(6)

Labor Law Section 241(6) provides:

"All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work... shall comply therewith."

This section of Labor Law imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to workers such as the plaintiff.²⁵ To maintain a viable claim under Labor Law § 241 (6), plaintiff must

²¹ *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280,291 (2003); *See also Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35,40 (2004).

²² *See Diakite EBT* at 33:13 to 35:5-7 (Plaintiff stating that the machine operator showed him how to tie a cable and not sure how the pole detached from the cable).

²³ *Id.*

²⁴ *See Diakite EBT* at 10:18-25 (Plaintiff alleges that he only speaks Soninke and only spoke to other Soninke speakers); *See also Piletto EBT* at 33:12-13 ("I would take him onto the site. I would bring him because there was a language barrier and I would show him what to do and what not to do").

²⁵ *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 (1998).

specifically plead and prove the violation of the applicable Industrial Code provision mandating compliance with concrete or clear specifications.²⁶ Here, Plaintiff, in his cross-motion, alleges the accident was proximately caused by the following violations of Industrial Code provision, including:

- (1) 12 NYCRR § 23-4.2(k): **“Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.”**
- (2) 12 NYCRR § 23-9.2(g): **“Equipment at rest. The operators of material handling equipment shall not leave such equipment while loads, buckets or blades are suspended. Any such load, bucket or blade shall be brought to rest on blocks, shall be lowered to the ground, grade or equivalent surface or shall be brought to the lowest end of travel of the equipment.”**

Plaintiff posits that his activities that resulted in the accident were covered under these applicable Industrial Code sections. Specifically, attaching the cord to 150 lbs metal bar and aligning it with a hole constituted excavation under 12 NYCRR § 23-4.2(k). Furthermore, by permitting plaintiff to work in a place where the metal bar was left in a precarious position, defendants violated section 12 NYCRR § 23-9.2(g) of the Industrial Code.

After reviewing the submitted record and the relevant case law, this court determines that neither of these sections are applicable to the alleged facts. First Department has previously held that that industrial code 12 NYCRR § 23-4.2(k) is too vague a predicate for Labor Law § 241(6) liability.²⁷ Furthermore, the work that was being performed was not excavation work, and plaintiff was not struck by excavation equipment. Rather, a casing was being drilled into a previously created hole and he was struck by a pulled casing. Finally, Industrial Code § 23-9.2(g)

²⁶ See *Misicki v Caradonna*, 12 NY3d 511, 515 (2009).

²⁷ See *Willis v. Plaza Constr. Corp.*, 151 A.D.3d 568, 568 (2017) (“§ 23-4.2(k) is insufficiently specific to support a Labor Law § 241(6) claim”); See also *Sparendam v. Lehr Constr. Corp.*, 24 AD3d 388, 389 (2005) (§ 23-4.2(k) lacks the specificity required to qualify for predicate liability under Labor Law § 241(6)).

qualifier of “Equipment at rest” eliminates the applicability of the section in this matter. It is undisputed that at the time of the accident, the subject machine was not left at rest, but was being operated and being used to lower the casing into place. Accordingly, plaintiff’s claims pursuant Labor Law § 241(6) for violations of Industrial Code sections 12 NYCRR § 23-4.2(k) and 12 NYCRR § 23-9.2(g) must be dismissed.

III. Contractual and Common Law Indemnification and Breach of Contract Cross Claims

A. Contractual and Common Law Indemnification

In addition to seeking summary judgment against plaintiff, named defendants argue they are entitled to indemnity cross-claims. GP-258 the site owner posits that it is entitled to indemnity from general contractor Pine Builders and sub-contractor Wilbourn as the incident arose out of the performance of their work and alleged negligence of their employees. The general contractor maintains that Wilbourn, as a sub-contractor exercised exclusive supervision and control over the injury-causing work. Wilbourn applies for common-law indemnification against GP-258 and Pine Builders on grounds that Pine Builders was responsible for hiring and supervising the plaintiff, and GP-258 failed to finance the project adequately.

Clause 8.12 of the contract between GP-258 and Pine Builders states:

To the fullest extent permitted by law, [Pine Builders] shall indemnify and hold harmless [GP-258], the other Additional Insureds identified in Exhibit D, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of [Pine Builders], [Wilbourn], anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.²⁸

²⁸ GP-258 Attorney Affirmation, Ex. L.

Here, the contractual indemnification provision requires Pine Builders to indemnify GP-258 if the incident resulted from their negligent act. Whereas, "[c]ommon-law indemnification is generally available 'in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer.'" ²⁹ "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant". ³⁰ "In distinction, in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the non-delegable duty imposed by Labor Law Section 240(1)."³¹

Pine Builders in opposing GP-258's application for contractual indemnification contend that it is premature to grant this motion as no negligence has been imputed upon them. Furthermore, Wilbourn contends that the owner was negligent by failing to finance the project adequately. Wilbourn fails to, however, specify how this alleged failure imputes negligence upon the owner.

In GP-258's reply, the owner argues the only potential causes of action are "the negligence of plaintiff in securing the piles and pulling on the pipe, the negligence of Wilbourn in operating the drill and directing plaintiff how to perform his work, or the negligence of Pine in

²⁹ *McCarthy v Turner Constr., Inc.*, 17 N.Y.3d 369, 375 (2011).

³⁰ *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65, 693 N.Y.S.2d 596, citing *Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430.

³¹ *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65, 693 N.Y.S.2d 596, citing, *McDermott v. City of New York*, 50 N.Y.2d 211, 428 N.Y.S.2d 643, 406 N.E.2d 460.

failing to adequately train plaintiff, provide him with adequate safety materials, or directing plaintiff how to perform the work.”³² GP-258 did not provide tools nor material to the construction site, did not direct, control, or supervise any of the work being performed, and was not involved in the day to day activity onsite.³³ GP-258 remains in this action only by the obligation imposed by law, the non-delegable duty to maintain a safe workplace imposed on owners by Labor Law Section 240(1). GP-258 is entitled to conditional³⁴ summary judgment on its indemnification claim against Pine Builders and Wilbourn as there has been no determination of fault on their end. Furthermore, Wilbourn’s claim for common law indemnification is dismissed as it failed to raise an issue of fact to impute negligence on the owner.

For the same reasons stated above, Pine Builders and Wilbourn’s applications for summary judgment for common law indemnification cross-claims against each other must be denied. Issues of fact exist regarding whether Wilbourn’s employee in operating the drill and directing plaintiff a Pine Builders’ employee on how to perform his work was negligent and whether the negligence of Pine Builders in failing to train plaintiff, provide him with adequate safety materials adequately, or directing plaintiff how to perform the work. These are issues for a trier of fact to determine and cannot be summarily decided by operation of law.

B. Breach of Contract

GP-258 seeks summary judgment on its claim for breach of contract for failure to procure insurance against Pine Builders. Pine Builders also move for summary judgment on its breach of contract claim for failure to procure insurance against Wilbourn. By failing to procure

³² GP-258 Attorney Reply Affirmation at 11.

³³ GP-258 Attorney Affirmation, Ex. I at 24-25, 81; Ex. K at 67, 74-75; Ex. R at 87; Ex. S at 18, 79; Ex. T at 38-39.

³⁴ *Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543 (1st Dept 2015) (“Although...there has been no determination as to [contractor] or its subcontractors' negligence in connection with the [incident], [Owner] may be granted conditional summary judgment on its cross claim against [contractor] for indemnification”).

insurance as per their contractual obligation, a party is “is liable for the resulting damages, including the amount of damages awarded to or paid to the injured party in the main action, within the limits of the policy that was to have been procured, as well as the costs incurred in defense of the main action”.³⁵

Pine Builders acknowledge their obligation to obtain general liability insurance naming GP-258 as an additional insured and argue that it procured an insurance policy for GP-258 based on blanket additional insured endorsement provision in their insurance contract.^{36 37} Contrary to GP-258’s contention, the submitted evidence demonstrates that Pine Builders complied with its obligations under this provision by procuring an insurance policy from Southwest Marine and General Insurance Company which includes a blanket additional insured endorsement providing additional insured coverage as required in written contracts entered into by Pine Builders.³⁸ Based on the language in Pine Builders’ insurance policy, a general contractor has made a prima facie showing as a matter of law that it complied with its contractual obligation to procure insurance; therefore GP-258’s motion for summary judgment for breach of contract is denied.³⁹

Pine Builders in moving for summary judgment on its breach of contract claim for failure to procure insurance against Wilbourn, cites to a work proposal and emails between the parties.⁴⁰ Wilbourn moves to dismiss the contractual claim. There was no written contract between the parties. In the email exchange, a project manager for Pine Builders requests for

³⁵ *Encarnacion v. Manhattan Powell L.P.*, 258 A.D.2d 339, 340 (1999), citing *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 219 (1990).

³⁶ Pine Builder’s Attorney Affirmation in Partial Opposition at

³⁷ *Id.* Exhibit 1.

³⁸ *Id.* Exhibit Q.

³⁹ The proper avenue to pursue insurance coverage under this policy is a declaratory judgment action pursuant to CPLR 3001.

⁴⁰ Pine Builder’s Attorney Affirmation in Support, Exhibit T.

insurance before he sends them a notice to proceed.⁴¹ There is a question of fact, whether documents provided, minus the insurance policy were either deemed acceptable to Pine Builders. It is unclear from the evidence presented that there was a meeting of the minds sufficient to give rise to an enforceable contract.⁴² Accordingly, motion for summary judgments on Pine Builders' breach of contract claim against Wilbourn is denied. Accordingly, it is

ORDERED that defendants motions (Seq 006, 007, 008) are partially granted to the extent that their motions to dismiss plaintiff's claims pursuant to CPLR 3212, for summary judgment dismissing claims for/against (1) Commons law negligence; (2) Labor Law §200; (3) NYC Administrative Code; and (4) EH Builders and Pine Builders on the basis of Workers' Compensation Law are unopposed by him and are deemed abandoned, and the defendants are entitled to summary judgment dismissing plaintiff's claims thereunder; it is further

ORDERED that defendants motions (Seq 006, 007, 008) are partially granted to the extent that their motions to dismiss plaintiff's claims pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 12 NYCRR § 23-4.2(k) and 12 NYCRR § 23-9.2(g) as against all defendants are granted, and these claims are dismissed; it is further

ORDERED that defendants motions (Seq 006, 007, 008) to dismiss plaintiff's claims pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 240 (1) claim is denied; it is further

⁴¹ *Id.* Pg 1., Email dated July 18, 2012.

⁴² See *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 (2005).

ORDERED that plaintiff's cross-motion (Seq 006) for summary judgment pursuant to CPLR 3212 in favor of plaintiff is denied in its entirety; it is further

ORDERED that E.H. BUILDERS CORPORATION motion (Seq 007) motion for summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims is granted as unopposed by any party. The Clerk of the Court is to amend the caption to reflect their dismissal as such:

**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13**

ALFOUSSEYNI DIAKITE,

Plaintiff,

Index: 22633-2013

- against -

Hon. Fernando Tapia, J.S.C.

**GP-258 NORTH 9TH STREET, LLC, PINE BUILDERS CORP.,
and WILBOURN CONSTRUCTION LLC,**

Defendants.

; it is further

ORDERED that defendant GP-258 NORTH 9TH STREET, LLC motion (Seq 006) for summary judgment pursuant to CPLR 3212 for contractual and common law indemnification cross-claims against PINE BUILDERS CORP., and WILBOURN CONSTRUCTION LLC, is conditionally granted. PINE BUILDERS CORP. and WILBOURN CONSTRUCTION LLC are to indemnify GP-258 NORTH 9TH STREET, LLC if they are found negligent for plaintiff's accident; it is further

ORDERED that defendants PINE BUILDERS CORP motion (Seq 007) and WILBOURN CONSTRUCTION LLC motion (Seq 008) for summary judgment pursuant to CPLR 3212 for indemnification cross-claims against each other are be denied; it is further

ORDERED that defendant GP-258 NORTH 9TH STREET, LLC motion (Seq 006) for summary judgment pursuant to CPLR 3212 for a breach of contract cross-claim against PINE BUILDERS CORP. is denied; it is further

ORDERED that defendant PINE BUILDERS CORP motion (Seq 007) for summary judgment pursuant to CPLR 3212 for a breach of contract cross-claim against WILBOURN CONSTRUCTION LLC., and defendant WILBOURN CONSTRUCTION LLC motion (Seq 008) to dismiss this claim are denied.

Any arguments not addressed herein were considered and deemed to be without merit. This constitutes the decision and order of the court.

Dated: March 3, 2020

Bronx, New York



Hon. Fernando Tapia J.S.C.