

Rizvani v New York City Hous. Auth.

2020 NY Slip Op 31386(U)

April 30, 2020

Supreme Court, Kings County

Docket Number: 503171/2016

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

0

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 360 Adams Street, Brooklyn, New York, on the 30th day of April, 2020.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

-----X

FATOS RIZVANI,

Plaintiff,

Index No. 503171/2016

- against -

DECISION AND ORDER

NEW YORK CITY HOUSING AUTHORITY,
and MHM ENGINEERING, P.C. d/b/a JCT
ENGINEERING AND CONSTRUCTION,

Defendants,

Motion Seq. # 10, 11 & 12

-----X

NEW YORK CITY HOUSING AUTHORITY,

Third Party Plaintiff,

- against -

AAA WINDOWS AND DOORS CORP.,

Third Party Defendants,

-----X

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

	<u>Papers Numbered</u>
Notice of Motion/Cross-Motion and Affidavits (Affirmations) Annexed	<u>1/2, 3/4, 5/6</u>
Opposing Affidavits (Affirmations)	<u>7, 8, 9, 10</u>
Reply Affidavits (Affirmations)	<u>11, 12, 13</u>

Upon the foregoing papers, and after argument, the Court finds as follows:

The instant proceeding relates to an accident that the Plaintiff, Fatos Rizvani (hereinafter referred to as the "Plaintiff") allegedly suffered on June 4, 2015 while employed by the Third Party Defendant, AAA Windows, Inc. (hereinafter referred to as "AAA"). On the day at issue, the Plaintiff was purportedly instructed to conduct pointing work on the brick façade of a building that was owned and managed by the Defendant, New York City Housing Authority

(hereinafter referred to as "NYCHA"). In his complaint, the Plaintiff alleges causes of action for common law negligence and violations of Labor Law 200, 240(1) and 241(6).¹

The Plaintiff moves (motion sequence #10) for an order pursuant to CPLR 3212 for summary judgment on the issue of liability as it relates to the Plaintiff's Labor Law 240(1) and 241(6) claims. The Plaintiff contends that NYCHA is liable as a matter of law for the Plaintiff's Labor Law 240(1) and 241(6) claims given that it owned the Premises at issue on the date of the accident. Specifically, the Plaintiff contends that his injuries were caused by the ladder that he was using slipping out from under him. The Plaintiff contends that the ladder at issue was not held or otherwise tied securely, or equipped with the proper "feet," in order to prevent the ladder from slipping under the Plaintiff's weight. The Plaintiff also moves, pursuant to CPLR 3216, for an order striking the Third Party Defendant AAA's answer. The Plaintiff contends that AAA has failed to comply with discovery demands and is in violation of multiple discovery related Court orders.²

Defendant NYCHA opposes the motion and argues that it should be denied. Specifically, NYCHA contends that the Plaintiff's motion should be denied as it relates to the Labor Law 240(1) claim, as there are questions of fact as to whether the ladder was defective or inadequately secured. As to the Plaintiff's Labor Law 241(6) claim, NYCHA contends that the Plaintiff does not know the reason why the ladder slipped out, and therefore, cannot establish that the ladder slid because of a violation of the Industrial Code.

NYCHA also moves (motion sequence #11) for an order, pursuant to CPLR 3212, for summary judgment as to the Plaintiff's common-law negligence and Labor Law 200 claims. NYCHA contends that the Plaintiff's purported injuries were the result of the means and methods of the work conducted by the Plaintiff, at the direction of his employer AAA. NYCHA further contends that they cannot be held liable as a matter of law given that NYCHA did not supervise the Plaintiff or control the means and methods of his work. NYCHA also seeks an order pursuant to CPLR 3212 for summary judgment in relation to its own claim for contractual

¹ A review of the record indicates that the claim as against MHM Engineering, P.C. has been discontinued.

² Plaintiff has shown good cause in support of the timeliness of this motion. Outstanding discovery compliance resulted in a reasonable delay to move. See *Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 [2004]; *Khan v. Macchia*, 165 A.D.3d 637, 638, 84 N.Y.S.3d 233 [2nd Dept 2018]; *Parker v. LJJMC-Satellite Dialysis Facility*, 92 A.D.3d 740, 742, 939 N.Y.S.2d 96, 98 [2nd Dept 2012].

indemnification against AAA. NYCHA contends that its contract with AAA contained an indemnification clause that should be enforced as a matter of law.

Both the Plaintiff and AAA oppose NYCHA's motion. AAA contends that NYCHA's motion should be denied as there are issues of fact as to NYCHA's supervision and control over the worksite. Specifically, AAA contends that NYCHA did not provide sufficient evidence to show that the ladder being used at the Premises on the day in question was not owned by NYCHA. AAA further contends that if the Court does not grant NYCHA's application for summary judgment as it relates to the Plaintiff's negligence and Labor 200 claims, the Court cannot grant NYCHA's application for contractual indemnification, since it would be premature.

AAA also moves (motion sequence #12) for an order, pursuant to CPLR 3212, for summary judgment as to NYCHA's third party claims for common law contribution and indemnification. AAA otherwise contends that it is not liable to NYCHA for contractual indemnification because AAA was the Plaintiff's employer and such a claim is barred by the New York State Workers' Compensation Law, section 11. Further, AAA contends that the Plaintiff did not sustain a grave injury as defined by the Workers' Compensation Law and as a result, NYCHA's third party claim against AAA should be dismissed. NYCHA opposes the motion by AAA. NYCHA contends that the argument asserted by AAA is misplaced as indemnification is available, notwithstanding the Workers' Compensation Law bar, when two parties have provided for it as a part of an agreement.

As an initial matter, the Court denies that aspect of the Plaintiff's motion which seeks to strike AAA's answer for failing to comply with Plaintiff's various discovery requests (CPLR 3126). The moving party on a motion seeking to resolve a discovery dispute has the burden of demonstrating that they have satisfied the requirements of 22 NYCRR §202.7(c). Said rule provides as follows:

The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

22 NYCRR §202.7(c).

The purpose of the rule requiring an affirmation of good faith is to ensure that the parties seek to resolve disputes prior to the Court's involvement, so as to narrow the focus of the dispute and potentially eliminate the Court's involvement. In the instant proceeding, the Plaintiff has failed to provide any information regarding any prior communication between the parties and what steps were taken to resolve the discovery dispute at issue. This is insufficient and the lack of a good faith showing on the part of the Plaintiff. As a result, the instant motion is procedurally defective and is therefore accordingly denied. See *Quiroz v. Beitia*, 68 A.d.3d 957, 960, 893 N.Y.S.2d 70, 74 [2nd Dept 2009]; *Hegler v. Loews Roosevelt Field Cinemas, Inc.*, 280 A.D.2d 645, 646, 720 N.Y.S.2d 844 [2nd Dept 2001]; *Barnes v. NYNEX, Inc.*, 274 A.D.2d 368, 711 N.Y.S.2d 893 [2nd Dept 2000].

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be imposed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2nd Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of material issues of fact. See *Sheppard-Mobley v. King*, 10 A.D. 3d 70, 74 [2nd Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 A.D.2d 493 [2nd Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558-559, 610 N.Y.S.2d 50 [2nd Dept 1994].

Labor Law §240(1)

Labor Law §240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides in pertinent part that:

All contractors and owners and their agents... who contract for but do not direct or control the work, 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) provides exceptional protection for workers against the special hazards that arise when the work site is either elevated or positioned below the level where materials are being hoisted.” *Walker v. City of New York*, 72 A.D.3d 936, 937, 899 N.Y.S.2d 322, 323 [2nd Dept 2010]. In order to prevail on a Labor Law §240(1) cause of action, “[a] plaintiff must establish that the statute was violated and the violation was a proximate cause of his [or her] injuries” *Delahaye v. Saint Anns School*, 40 A.D.3d 679, 682 [2d Dept 2007]; see *Berg v. Albany Ladder Co., Inc.*, 10 N.Y.3d 902, 904 [2008]; *Robinson v. East Med. Ctr., L.P.*, 6 N.Y.3d 550 [2006]. “Liability may, therefore, be imposed under the statute only where the ‘plaintiff’s injuries were the direct consequences of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.”” *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015] quoting *Runner v. New York Stoc Exch., Inc.*, 13 N.Y.3d 599, 603, 922 N.E.2d 865 [2009].

Plaintiff’s Motion Sequence #10

Turning to the merits of the motion made by the Plaintiff, the Court finds that the Plaintiff has provided sufficient evidence to meet his *prima facie* burden in relation to his Labor Law §240(1) claim. In support of his application, the Plaintiff relies on his own affidavit, his 50-h hearing testimony, and his deposition. The Plaintiff testified that he was injured because the ladder, upon which he was standing, was not properly secured and was not properly equipped with “safety feet” to prevent it from slipping. The Plaintiff alleges, as part of his affidavit,

deposition and 50-h testimony, that his AAA co-worker leaned the 17 foot ladder against a hanging scaffold and that the ladder was placed on a plastic drop cloth. He stated that the ladder was not secured or tied and did not have safety feet. He represents that he was forced to descend the ladder in order to retrieve equipment, without the adequate use of a safety line and descended as purportedly instructed (two hands, two feet), when the ladder slipped and he fell to the ground (see Plaintiff's Motion, Exhibit 1, 2, and 3). When a safety device "collapses, moves, falls, or otherwise fails to support a worker, that worker is entitled to summary judgment in his favor pursuant to §240 of the Labor Law, as a matter of law." *Gilhooly v. Dormitory Authority of State of New York*, 51 A.D.3d 719 [2nd Dept 2008]; *see also McCaffery v. Wright & Co. Const.*, 71 A.D.3d 842, 843, 895 N.Y.S.2d 835, 836 [2nd Dept 2010]; *Yin Min Zhu v. Triple L. Grp., LLC*, 64 A.D.3d 590, 881 N.Y.S.2d 324 [2nd Dept 2009].

In opposition, NYCHA has failed to raise a material issue of fact that prevents this Court from granting summary judgment. NYCHA contends that the Plaintiff's application should not be granted because there are issues of fact regarding whether the ladder was improperly secured and whether there is proof that the ladder was placed on a slippery surface. NYCHA also points to the contract between AAA and NYCHA whereby AAA was responsible for securing the ladder. However, neither NYCHA nor AAA proffers evidence that would raise a material issue of fact regarding the Plaintiff's contentions. Further, any arguable issues of comparative negligence on the part of the Plaintiff is immaterial because §240 of the Labor Law does not permit the assertion of comparative negligence on the part of the worker. Here, there is no indication that the Plaintiff was the sole proximate cause of the accident. *See Zimmer v. Chemung Cty. Performing Arts, Inc.*, 65 N.Y.2d 513, 482 N.E.2d 898 [2nd Dept 1985]. As a result, the Plaintiff's application for summary judgment as it relates to liability on its Labor Law §240(1) is granted.

Labor Law §241(6)

Labor Law §241(6) imposes on owners and contractors a non-delegable duty "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed." *Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085, 1086 [2nd Dept 2015]; *Lopez v. New York City Dept. of*

Envtl. Protection, 123 A.D.3d 982, 983 [2nd Dept 2014]. To establish liability under Labor Law §241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. See *Misicki v. Caradonna*, 12 N.Y.3d 511, 515 [2009]; *Ross v. Curtis- Palmer Hydro Elec. Co.*, 81 N.Y.2d 494, 505 [1993]; *La Veglia v. St. Francis Hosp.*, 78 A.D.3d 1123 [2nd Dept 2010]; *Pereira v. Quogue Field Club of Quogue, Long Is.*, 71 A.D.3d 1104 [2nd Dept 2010].

Turning to the merits of the motion made by the Plaintiff, the court finds that the Plaintiff has provided sufficient evidence to meet his *prima facie* burden in relation to his Labor Law §241(6) claim. In support of his application, the Plaintiff relies on his own affidavit, his 50-h Hearing testimony, and the Plaintiff's deposition (Plaintiff's motion Exhibits 1, 2, and 3, respectively). Labor 241(6) imposes vicarious liability on building owners where there is a violation of a regulation in the Industrial Code that proximately causes injury to a worker at a construction site. In the instant proceeding the Plaintiff's ladder was allegedly not being held in place and was not secured. Accordingly, there is *prima facie* evidence of a violation of §23-1.21(b)(4)(iv) of the Industrial Code, which provides in pertinent part that:

[W]hen work is being performed from ladder rungs between six and ten feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means.

The evidence presented by the Plaintiff shows that there was no person holding the ladder at issue in place and nothing securing the ladder by mechanical means as required by §23-1.21(b)(4)(iv) of the Industrial Code. See *Blair v. Christian*, 296 A.D.2d 471, 472, 745 N.Y.S.2d 468, 469 [2nd Dept 2002].

In opposition, NYCHA has failed to raise a material issue of fact that prevents this Court from granting summary judgment on the issue of liability. NYCHA contends that the Plaintiff's motion should not be granted because there are issues regarding the Plaintiff's comparative negligence. However, neither NYCHA nor AAA present evidence that would raise a material issue of fact regarding whether the Plaintiff was the sole proximate cause of the accident. See

Rodriguez v. City of New York, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018]. As a result, the Plaintiff's application for summary judgment as it relates to liability on his Labor Law 241(6) claim is granted, subject to a comparative negligence analysis at trial.

Labor Law §200 and Common Law Negligence

Liability under Labor Law §200, for injuries arising from the manner in which work is performed, must be premised upon one having the authority to exercise supervision and control over the work. See *Lombardi v. Stout*, 80 N.Y.2d 290, 295 [1992]; *Hernandez v. Pappco Holding Co.*, 136 A.D.3d 981, 982 [2nd Dept 2016]; *Torres v. City of New York*, 127 A.D.3d 1163, 1165 [2nd Dept 2015]; *Gallelo v. MARJ Distribs. Inc.*, 50 A.D.3d 734, 735 [2nd Dept 2008]. "A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed." *Torres v. Perry St. Dev. Corp.*, 104 A.D.3d 672, 676 [2nd Dept 2013] quoting *Ortega v. Puccia*, 57 A.D.3d 54, 62 [2nd Dept 2008]. Generally, "...the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulation and contract specification is insufficient to impose liability under Labor Law §200 or for common-law negligence." *Banscher v. Actus Lend Lease, LLC*, 12 A.D.3d 707, 709 [2nd Dept 2015], quoting *Gasques v. State of New York*, 59 A.D.3d 666, 668 [2009], *affd.* 15 N.Y.3d 869 [2010].

Turning to the merits of NYCHA's motion, in relation to the Plaintiff's Labor Law §200 and common-law negligence claim (motion sequence #11), the Court finds that NYCHA has provided sufficient evidence to meet their *prima facie* burden in relation to the dismissal of the Plaintiff's claim. NYCHA relies primarily on the deposition of Maurice Brown, the NYCHA Supervisor of Caretakers and Martin Maleski, who at the time of the accident was purportedly a supervisor for AAA, to support the position that NYCHA did not supervise or control the performance of the Plaintiff's work. NYCHA argues that they cannot be held liable for the Plaintiff's injuries pursuant to Labor Law §200 given that they contend that they did not supervise or control the work of the Plaintiff. "When the methods or materials of the work are at issue, 'recovery against the owner or general contractor cannot be had... unless it is shown that

the party to be charged had the authority to supervise or control the performance of the work.” *Messina v. City of New York*, 147 A.d.3d 748, 749, 46 N.Y.S.3d 174, 176 [2nd Dept 2017], quoting *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 [2nd Dept 2008]. Also, there was no claim that the Premises was otherwise unsafe or dangerous and that such a condition contributed to the Plaintiff’s injuries. In opposition, the Plaintiff failed to raise a material issue of fact that would prevent the Court from granting summary judgment.

Indemnification

The Court grants AAA’s motion (motion sequence #12) for an order, pursuant to CPLR 3212, for summary judgment dismissing NYCHA’s third party claims for common law indemnification and contribution. Any claim for common law indemnification is limited by New York State Workers Compensation Law §11, and the Plaintiff in this matter did not allege that he sustained a “grave injury.” See *Schuler v. Kings Plaza Shopping Ctr.*, 294 A.D.2d 556, 743 N.Y.S.2d 141 [2nd Dept 2002] and *Keating v. Nanuet Bd. Of Educ.*, 40 A.D.3d 706, 835 N.Y.S.2d 705 [2nd Dept 2007]. However, NYCHA is correct that contractual indemnification is available, notwithstanding the Workers’ Compensation Law bar, when two parties have provided for it as part of an agreement.

Turning to the merits of the motion made by NYCHA (motion sequence #11), the Court finds that NYCHA has met its *prima facie* burden. NYCHA contends that AAA had agreed through the contract between the parties to indemnify NYCHA in the event that there were claims of negligence against NYCHA “ ... to the fullest extent permitted by applicable law...”. Further, NYCHA contends that the claims made by the Plaintiff relate to the alleged negligence of AAA. Generally, “[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.” *De Souza v. Empire Transit Mix, Inc.*, 155 A.D.3d 605, 606, 63 N.Y.S.3d 473, 475 [2nd Dept, 2017], quoting *Cuellar v. City of New York*, 139 A.D.3d 996, 998, 32 N.Y.S.3d 292, 294 [2nd Dept 2016].

In support of its application, NYCHA relies primarily on the contract between NYCHA and AAA. Article II Paragraph 5 of the contract between NYCHA and AAA specifies that the

contractor (AAA) shall indemnify NYCHA resulting directly or indirectly from the work of AAA or its subcontractors. Specifically, §5(g) states that “[w]ith respect to any claim made or suit brought against the Authority by any person arising out of, resulting from, or in connection with any of the above risks assumed by the Contractor, the Contractor shall negotiate the settlement thereof or defend the same at his own cost and expense, and pay all costs, expenses and judgments recovered against the Authority, its members, officers, agents, and employees.” (See NYCHA Motion, Exhibit S, Article III, Paragraph 5).

In the instant proceeding, the contract provisions at issue are sufficiently clear that indemnification stems from any claim made or suit brought “arising out of, resulting from, or in connection with any of the above risks assumed by the Contractor.” As a result, NYCHA has met its *prima facie* burden. See *Cuellar v. City of New York*, 139 A.D.3d 996, 998, 32 N.Y.S.3d 292, 294 [2nd Dept 2016]; *Barnes v. New York City Hous. Auth.*, 43 A.D.3d 842, 844, 841 N.Y.S.2d 379, 382 [2nd Dept 2007].

In opposition, AAA does not raise a material issue of fact that would prevent this Court from granting the summary judgment motion made by NYCHA. See *Giagarra v. Pav-Lak Contr.*, 55 A.D.3d 869, 866 N.Y.S.2d 332 [2nd Dept 2000] and *Castillo v. Port Auth. Of N.Y. & N.J.*, 159 A.D.3d 792, 72 N.Y.S.3d 582 [2nd Dept 2018]. Accordingly, the application by NYCHA for summary judgment on its contractual indemnification and contribution claims is granted in accordance with the terms of the contract of the parties and as such are subject to a comparative negligence analysis at trial.

Based upon the foregoing, it is hereby Ordered that:

The Plaintiff’s motion for summary judgment on the issue of liability (motion sequence #10) as it relates to the Plaintiff’s Labor Law 240(1) claim is granted, and as it relates to Plaintiff’s Labor Law 241(6) claim the motion is granted subject to a comparative negligence analysis at trial.

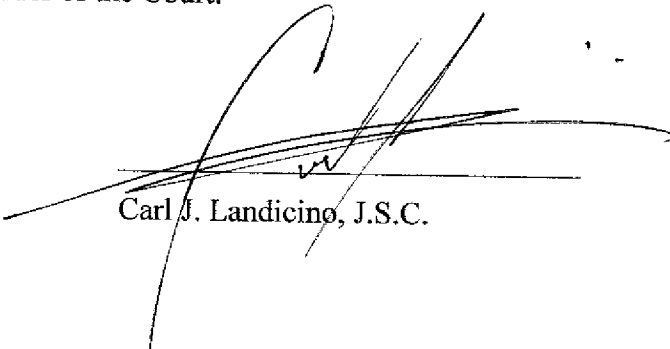
NYCHA’s motion for summary judgment (motion sequence #11) is granted to the extent that the Plaintiff’s Labor Law 200 and common-law negligence claims are dismissed.

NYCHA's motion for summary judgment as to its contractual indemnification and contribution claims as against AAA is granted in accordance with this decision.

AAA's motion for summary judgment (motion sequence #12) is granted and NYCHA's claims for common law indemnification and contribution are dismissed.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.